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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

QUESTION ONE:

SHOULD THE DEFENDANTS' PROXY SUPPLEMENT HAVE BEEN ALLOWED OR CONSIDERED BY THE COURTS BELOW FOR ANY PURPOSE IN VIEW OF THE FOLLOWING FACTS?

(1) EVEN THOUGH THE OMISSIONS SUED UPON WERE POINTED OUT TO THEM BEFORE SUIT WAS BROUGHT, DEFENDANTS DELIBERATELY WITHHELD THE MODIFICATION OF THEIR PROXY UNTIL SUIT HAD ACTUALLY BEEN COMMENCED AND WOULD NOT HAVE AMENDED AT ALL HAD THIS LAWSUIT BEEN ABANDONED.

(2) THE SUPPLEMENT WAS CIRCULATED FOR THE EXPRESS PURPOSE OF CREATING A DEFENSE TO THIS LAWSUIT, BUT SUCH FACT WAS NOT DISCLOSED TO THE PLAINTIFF CLASS.

(3) TO THE CONTRARY, THE SUPPLEMENT REPRESENTED TO THE PLAINTIFFS THAT THE WITHIN LAWSUIT WAS "WITHOUT MERIT" AND THAT THE SUPPLEMENT WAS ONLY BEING CIRCULATED PURSUANT TO A NON-EXISTENT POLICY OF DEFENDANTS TO KEEP SHAREHOLDERS "FULLY INFORMED."

(4) THE SUPPLEMENT WAS CAREFULLY DRAFTED TO CONVEY THE IMPRESSION THAT ALL DISCLOSURES DEMANDED BY THE COMPLAINT HAD BEEN MADE; WHEREAS THEY HAD NOT BEEN.

(5) IN VIEW OF THE FACT THAT CIRCULATION OF THE SUPPLEMENT WAS WITHHELD TILL THE

VERY LAST MINUTE WHEN MOST OF THE VOTES EVER TO BE CAST HAD ALREADY BEEN PUT INTO THE MAIL BACK TO DEFENDANTS AND DEFENDANTS DID NOT ASK FOR A NEW VOTE.

(6) IN OTHER WORDS, PETITIONERS ASK IF IT WAS PROPER TO PLACE THE ONUS OF CHANGING THEIR VOTES UPON THE OFFENDED SHAREHOLDERS OR SHOULD THE SOLICITATION HAVE ASKED FOR A COMPLETE NEW VOTE.

QUESTION TWO:

EITHER IN VIEW OF THE FOREGOING MATTERS OR AS AN INDEPENDENT PROPOSITION, SHOULD THE SUPPLEMENT NOT HAVE BEEN DISREGARDED B E C A U S E DEFENDANTS INTENTIONALLY BYPASSED THE COURT AND MAILED OUT THE SUPPLEMENT WHILE SUIT WAS PENDING WITHOUT NOTICE TO THE OPPOSING PARTY OR CONSENT OF THE COURT? WAS SUCH MEASURE NOT REQUIRED TO ASSURE JUDICIAL CONTROL OVER A PENDING LAWSUIT?

QUESTION THREE:

INASMUCH AS VIRTUALLY ALL OF THE ASSETS OF THE ONLY SUBSIDIARY FROM WHICH PETITIONING CLASS OF SHAREHOLDERS COULD RECEIVE ITS $39.60 CONTINGENT PAYMENT WAS COMPOSED OF "DUE FROM AFFILIATED COMPANIES" AND SUCH TRANSACTION WAS NOT NEGOTIATED ON AN ARM'S LENGTH BASIS AND LITTLE OR NO COMPENSATION WAS CONTRACTED OR PAID, AND INASMUCH AS SUCH ARRANGEMENT WAS NOT

DISCLOSED AT ALL IN THE ORIGINAL PROXY SOLICITATION AND WAS DISCERNABLE ONLY PARTIALLY (AND THEN ONLY TO THE PERCEIVING EYE) IN THE SUPPLEMENT, WERE DEFENDANTS NOT IN VIOLATION OF BOTH FEDERAL AND STATE LAW? AT A MINIMUM, SHOULD THE DISTRICT COURT NOT HAVE RELEGATED TO THE STATE COURTS ALL STATE LAW QUESTIONS PERTAINING TO SUCH $17 MILLION ITEM RATHER THAN ASSESS A $6,000 PENALTY AGAINST PLAINTIFFS FOR SUGGESTING ON REHEARING THAT THE COURT DO SO?

QUESTION FOUR:

(1) IS SUMMARY JUDGMENT A PROPER VEHICLE TO DETERMINE THE TRUE PURPOSE OF A PROXY SOLICITATION WHERE THAT MATTER IS IN ISSUE?

(2) IS A TRIAL ON THE MERITS NOT INDICATED WHERE QUESTIONS OF INTENT, PURPOSE AND MOTIVE MUST BE DECIDED?

(3) IN THE PRESENT CASE WHEREIN PETITIONERS HAVE CHARGED THAT THE TRUE PURPOSE OF THE REDEMPTION WAS TO FREEZE-OUT PREFERRED SHAREHOLDERS FROM PARTICIPATION IN THE ANTICIPATED BENEFITS OF A NEW VENTURE TO WHICH THE COMPANY WAS HEAVILY COMMITTING ITSELF, WAS IT PROPER TO DECIDE WITHOUT TRIAL ON THE MERITS THAT SUCH OBJECTIVE WAS MERELY A MATTER OF UNDERLYING MOTIVATION OF WHICH THE SECURITIES LAWS REQUIRE NO DISCLOSURE?

QUESTION FIVE:

WERE THE ATTORNEYS FOR PLAINTIFFS SO DERELICT IN THE PROSECUTION OF THE CASE THAT FORFEITURE OF THE ENTIRE CAUSE OF ACTION WAS WARRANTED? PARTICULARLY, INASMUCH AS THIS CASE HAD ALREADY (ON MOTION OF RESPONDENTS) BEEN CERTIFIED AS A CLASS ACTION THEREBY INVOLVING THE CLAIMS OF 2,000 SHAREHOLDERS AGGREGATING $33 MILLION, SHOULD NOT AND COULD NOT THE COURT HAVE ENFORCED THE DILIGENT PROSECUTION OF THE CASE THROUGH LESS ONEROUS MEANS?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioners wre plaintiffs and counter-defendants in the trial court. Petitioners were appellants and cross-appellees in the court of appeals. The case was docketed in the US District Court for the Southern District of New York on August 1, 1978 as No. 78 CIV 3516 (CES) bearing the same name as in this Court. The case was docketed in the United States Court of Appeals for the Second Circuit as No. 81-7515, 7535 & 7 and the case name was the same as in this Court.

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IN THE

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OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The informal opinion of the Second Circuit, text not to be published, affirmance to be tabulated at —— F.2d ——, filed January 7, 1982, is in the petitioners' appendix (PA 1).[1] The memorandum decision of the District Court (PA 4), filed May 4, 1981, is reported at 81 CCH FSec

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[1]In referring to the proceedings below, petitioners will employ the following abbreviations: (PA) — Petitioners' Appendix attached to this petition; (A) — (As a suffix, e.g. (1101A)) — Joint Appendix, Court of Appeals; (R) — Record in the US District Court. Such record bears no pagination. It will be referred to by record reference (R) plus title and file date or by reference to the item number on the Clerk's docket (1A) plus internal paging e.g. (R 14/3) is Clerk's docket item 14, page 3, being Memorandum Decision.

Unless otherwise indicated, all emphasis has been supplied.

¶98,245 but not in the Federal Supplement. Said Court's memorandum decision on rehearing (PA 17), not to be published, was filed June 11, 1981.

JURISDICTION

The judgment of the Court of Appeals (PA 19) was dated and entered January 7, 1982. A timely filed petition for rehearing was denied by order dated and entered February 24, 1982 (PA 20). On May 14, 1982, Mr. Justice Marshall extended the time to petition for certiorari to June 24, 1982. On June 15, 1982, Mr. Justice Marshall granted further extention to July 24, 1982. The jurisdiction of the Supreme Court is invoked under 28 USC §1254(1).

STATUTES AND RULES INVOLVED

SEC Ex Act, §14(a), 15 USC, §78n(a). *Proxies; tender offers.* (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SEC Ex Act, §10(b), 15 USC, §78j—*Manipulative and deceptive devices.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 CFR (78 ed.) §240.10b-5 *Employment of manipulative and deceptive devices.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 CFR (78 ed.) §240.14a-9 *False or misleading statements.* (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

STATEMENT OF THE CASE

Jurisdiction of the District Court was pleaded under the *Securities Exchange Act*, §27, 15 USC §78aa. Pendent jurisdiction was pleaded as to state law claims as well as diversity jurisdiction.

Space limits preclude complete discussion of error in the findings of the District Court (PA 4). Throughout, petitioners will point out presently significant disagreements and present omitted facts.

Fighting its way back from near collapse, MAI reorganized in 1971 and 1974. Class petitioners, paying $1,000 for a debenture in 1967 and voting for both reorganizations wound up with 20 C shares of $50; total face value, $1,000. However, 80% ($40 per share) was contingent on the cash flow of a single subsidiary, GOCC, and also subject to assignment of cash flow to a banking syndicate (the overhanging debt). The dividend was virtually nill.[2] (9, 10, 366-75, 386-402, 446-51A).

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[2]The Court's adoption of respondents' description of the $40 as a "dividend" (PA 6) is a misnomer. As between original obligor and obligee, the $40 was repayment of capital and recoupment of investment. C shares provided for a true dividend (earnings distribution) of $.01 annually, if declared (never done) (375-81A).

The complaint charges that the assets of GOCC were syphoned off, primarily to Basic Four Corp. which turned out to be extremely profitable. As the overhanging debt approached payout (when significant payments would commence accruing to petitioners) new lines of credit opened up to MAI causing respondents to commit to new ventures. (PA 22-32, 50-1; 16-8, 20-4, 1033-1100A; R. 52/47-51). But, C share restrictions gave exclusive marketing rights to GOCC mandating that 75% of the cash flow be applied to the $40 payment (PA 37; 97A). Meanwhile, MAI's refusal to distribute financial information concerning GOCC had depressed C share prices (13A; R. 52/13-4, 46), the creating opportunity and motivation to propound a coerced redemption for $10.50; only 50 cents above the guaranteed payment of $10 (37A). Charles Ben Howell, a Texas lawyer (610A) presently serving as a state district judge, 1 *TX Leg. Dir.* (82 ed.) 153 a 10 year MAI investor voted as requested in 1971 and 1974, but this time he brought suit (602-3, 630-45A).

Respondents have unceasingly attacked petitioner Howell and his attorney claiming bad faith,[8] incompetence

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[8]The July 12, 1978 letter (PA 63; see also PA 17) merely invited settlement negotiations. What a chilling effect the opinion (PA 17) would create if it imposed penalties merely for inquiring if the defendant desired to discuss settlement. The statement to the Circuit that Judge Howell offered not to sue in return for a private settlement to himself (fn. 9) is not referenced and is false. Respondents have no idea what counsel had in mind because they responded with a curt telephone call threatening to make any suit moot by last minute supplementation of the proxy (which has been done and countenanced). Later, after receiving an advance copy of the complaint with request for waiver of service, Mr. Walpin telephoned Judge Howell personally on Saturday, July 29, 1978, surreptitiously recording the conversation (all demands for the tape have been refused) and suggested that a private settlement was available in return for omitting class action pleadings and his prayer for a pre-

Fn. cont.

and sloth. Example: respondents devoted 72% of their statement in the Circuit (PA 56) to impugnment of the opposition. That court refused argument and silently rejected the cross-appeal but did the same to Judge Howell's appeal of a $6,000 penalty for filing a 15 page (brief and affidavit inclusive; amounting to $400 per page) unargued motion for rehearing asking, *inter alia*, that pendent claims be dismissed without prejudice (PA 4 ¶7, 17-9; R. 69, 70).

Contentions that the filing of suit was delayed "until the last minute to heighten settlement pressure," that the District Court motion to reconsider denial of an injunction was harassment because the Court lost jurisdiction when appeal was noticed, and that the ultimate non-suit of the injunction appeal proves bad faith are all unsupported.[4]

Petitioners urge the counterclaim itself was a bad faith pleading calculated to prevent us from associating with experienced New York securities lawyers. Respondents

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liminary injunction (905-19A). Offer rejected: the complaint contained class pleas and an injunction was diligently pursued.

We likewise fail to see how the Court read any motives from the September 1, 1978 letter (PA 64) stating the "simplest method of settling the case would be to ask **the Court's permission** to non-suit" before certification (PA 64). Obviously, filing of the counterclaim brought settlement discussions to a halt.

[4]Respondents (and possibly the Courts) have lost sight that most private securities actions are David and Goliath litigation, where defendant's assets exceed plaintiff's 1000 to 1. Here, a small town general practitioner (626-30A) is pitted against a cadre of skilled and experienced specialists from the securities section of the 69th largest law firm in the country, **81-2 Lawyers Almanac 7.**

Respondents took months to prepare the proxy whereas petitioners' counsel had less than 30 days. It is remarkable that it was all done. Denial of the injunction put pressure on counsel to act immediately. He failed to note that it is not permissible to simultaneously appeal and move for rehearing. After Judge Van Graafeiland (who eventually served on the affirmance panel) declined to postpone the meeting, the appeal became pointless and non-suit was the only recourse (283A; R. 34).

knew that in order to move forward expeditiously, petitioners required additional counsel, who would be required to work on contingency, and that there had been several recent New York cases, assessing penalties for baseless actions in bad faith. Respondents' bad faith is proved by their rush to the courthouse.[5]

Judge Howell's deposition was the subject of more trial tactics.[6] In retrospect, class certification appears as further questionable trial tactics.[7] Exactly 15 days after completion,

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[5]While repeatedly criticizing Judge Howell for bringing this suit of plainly urgent nature without being able to immediately document all allegations, respondents counterclaimed three days after the injunction hearing, before obtaining Judge Howell's deposition, with no discovery and even before their answer was prepared. Why the rush? Tactics; an obvious attempt to make other lawyers wary of participation. Respondents apparently succeeded; the short pocketbook side of the case was unable to recruit additional attorneys (183, 543A; R. 7, 70/6).

[6]He came to New York for the injunction hearing. Respondents purposely waited two days until he departed town to demand a deposition 8 days later. Judge Howell moved for travel expense or several months' postponement to fit the matter with other proceedings. To save expense, he also asked for the concurrent deposition of respondent Kurshan. Both requests were denied and within 8 days Judge Howell appeared and deposed (543A; R. 8, 9, 17, 27).

[7]Being assured that Judge Howell had no spy within their organization, respondents decided to shoot for summary judgment before any claims could be verified, but they also desired to bar subsequent lawsuits. They notified petitioners that they would not oppose certification. Negotiations and discussions concerning the class definition and notice procedures ensued. They became restive; quick action was essential. Within 30 days, respondents filed their own motion to certify the class, an unheard proposition. The point as to questionable trial tactics is that they had Judge Howell's deposition in hand when they moved to certify and intended to make his lack of inside information the centerpiece of an MSJ already planned. (211, 230, 238, 237, 238A; R. 25, 26, 28, 31, 32, 33).

Respondents opposed the Kurshan deposition arguing that if certification was denied, the expense burden would force termination raising the possibility that this executive's time might be wasted.

Fn. cont.

petitioners were greeted with an MSJ and supporting documents aggregating 304 pages, together with a demand for response the day after Christmas, two weeks hence, an impossible demand[5] (266-543A; R. 47). Having briefed the case, petitioners did not rest. During March, 1980 they filed motions, briefs and affidavits opposing summary judgment and asking that a ruling be held in abeyance pending discovery. On March 31, a request for production, 21 pages in length asking 70 categories of documents, was filed[6] (965A, R. 53 thru 60).

The argument was weighty. Discretion precluded substantial expenditures of time or money before certification (202, 206A).

Certification granted, attorney Pattison, working alone, undertook circulating class notices; the task having been made particularly time consuming by the terms of the Court's order. The work was completed and court approval of notification was secured (241A; R. 44/endamt. 69/Aft 2).

[6]Petitioners were granted extensions until February 25, 1980. Petitioners then filed a 54 page opposing brief and requested two more weeks to complete briefing. A clerk gave notice by telephone that no additional time would be allowed. Several points still unbriefed, petitioners' attorney continued to labor. On March 7, 1980, the 85th day after service of respondents' opus, petitioners presented a completed brief, incorporating their previous brief and covering the entire case, which brief contained 19 issues, almost all separately briefed and running 141 pages. The time was not inordinate in view of the task. Petitioners' motion for leave to file was denied. However, the Court states that it considered the brief, anyhow (PA 7; 957, 992A; R. 52, 53/Notice, 53/Aft. 54).

[5]Respondents provided nothing; they superficially objected (988A) and further objected that they should not be required to produce before ruling on MSJ "sub judice, * * * none of the documents sought is necessary * * * to oppose said motion and all * * * requests will become moot if * * * granted" (989A).

Petitioners' motion for discovery time was also "sub judice;" a motion to compel would have added little; petitioners anticipated in view of the striking of their brief that no further opposition to the MSJ would be entertained, that a ruling would be forthcoming at any time; and that the Court would hold respondents to their untenable position, as declared. Counsel (reasonably to our view) deferred the burden of 1,500 miles travel to enforce discovery.

The Court did not rule immediately. It held a hearing in November, 1980, and expressed concern with four specific areas in which petitioners asserted discovery was needed (PA 22; 1033A; R. 58/8-11). The hearing was concluded by giving *respondents* leave to file a further brief; "Mr. Pattison, if * * * I need something further from you, I will let you know" (PA 32).

For 14 months, petitioners anticipated a ruling daily until May 4, 1981 when the Court not only denied discovery but granted summary judgment. Petitioners filed for rehearing suggesting that the Court's handling and long deliberation had delayed discovery (R. 69, 70/5-9). We cannot say that the $6,000 penalty was, in part, for impertinence, but respondents certainly urged those grounds on the Court (R. 72/17-22).

Petitioners regret this diversion from the merits but the Courts below have made the conduct of Judge Howell and attorney Pattison into such an issue that discussion is compelled.

ONE & TWO: THE SUPPLEMENT MUST BE DISREGARDED

In reply to petitioners' letter of July 12, 1978, respondents dared petitioners to proceed stating that suit would be made moot by amendment.[10] On July 24, 1978, the proposed complaint was delivered to counsel (R. 7, Ex. A & B). Respondents were apprised of petitioners' objections but they withheld action lamely explaining to the Second Circuit that defendants "did not know [petitioners' allegations] with certainty" until two days prior to August 8 when they mailed the supplement (Dft. Br. 2 Cr. 33, fn. 40; 345A).[11]

There was no new proxy solicitation (118A). The document was framed as a letter to "Dear Shareholder" giving "reasons" why respondents considered this lawsuit to be invalid. The conclusion states (124A) that "The polls shall remain open eight additional days" (until August 18) giving shareholders an opportunity to vote or change their vote. Considering that shareholders were initially given 44 days, the 8 days (less several days mailing time) was painfully short.

Respondents deliberately waited until suit was filed

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[10]The strategy was obviously based upon tactics employed in **Abramson v. Nytronics**, 313 FS 519 (SD NY 70) where Mr. Walpin participated, but this record reflects sharp practice far exceeding that case.

[11]Respondents secured a two-fold advantage by deferring the supplement until the last minute: First, the closer to the originally declared meeting date, the more shareholders would already have mailed their proxy, giving defendants full advantage of human inertia and the common disaffinity to reconsider things already decided. August 6 being a Sunday, no one received the supplement until August 7 and outside of the New York area, delivery would have been on August 8 or August 9. By then, all but a few deadline hangers had already responded. The second advantage was trial tactics. Petitioners' counsel received no advice of the supplement until two hours before the injunction hearing and could not intelligibly respond.

but then rushed pell-mell to the mail prior to the injunction hearing with the obvious purpose of greeting the Court with *fait accompli* and so that objections from petitioners would come too late. How much more open; how much greater cooperation respondents could have exhibited by following the *Abramson* precedent wherein defendants, *at the injunction hearing* agreed to postpone for five weeks and issue a supplement "which they believed would meet the objections" stated. *Supra*, 522-3.

Summary Judgment Was Based Upon The Supplement: Respondents urged in the Circuit that the District Court had ruled that the original solicitation would support summary judgment, pointing to the Court's statement while comparing *Newgard v. Electro*, 76 CCH FSec¶95,805 (SD NY) that "here, * * *, there were no deliberate nor material omissions[13] from the initial proxy (PA 10), plus the statement that the supplement was "perhaps unnecessary" (PA 17) plus "we in no way consider plaintiff to be a prevailing party" (1123A). Our response: while the ruling lacks clarity, the supplement was extensively discussed.

Clearly, the Court was strongly persuaded by the midnight supplement.

If the Circuit had been in doubt as to the basis of the District Court's ruling, it would properly have remanded

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[13]It was plain error to require petitioners to prove "deliberate" proxy omissions. The registrant has the burden to cause solicitation to fully comply and make full and fair disclosure. Neither was the proper definition of materiality employed. **TSC v. Northway**, 426 U.S. 438, 449 (76) held an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.

> "Only if the established omissions ar so obviously * * * (unimportant) that reasonable minds cannot differ * * * is the ultimate issue of materiality appropriately resolved * * * by summary judgment." **Id.** 438.

for additional findings, but the Circuit resolved any question in petitioners' favor holding: "Judge Stewart * * * relied upon * * * the Supplemental Proxy * * *" (PA 3). The second leg of that ruling, that the reliance was "proper", was error, but the finding that the Trial Court did so rely is well supported. Additionally, the Court of Appeals itself clearly relied on the supplement and the Circuit's action is herein assigned as error.

The Supplement Was Deliberately Withheld: Respondents contend the Supplement was distributed "to save * * * the expense of litigation" (Dft. 2 Cr. Br. 31); a patent euphemism, inferentially admitting they were attempting to build a defense. The statement that they waited to find the contents of the complaint "with certainty" inferentially concedes that had suit been abandoned, there would have been no supplement.

In the District Court's view it matters not when material is distributed as long as it is received (PA 9). The Circuit apparently agreed (PA 3). The principle of "corporate therapeutics" has been overlooked. From the outset, management possesses the complete facts. The nature and extent of disclosure is primarily within its control. Full disclosure from the outset must be encouraged. Allowing a company to dash in with disclosures that should have been made in the first instance defeats the regulatory scheme. *Mills v. Autolite*, 396 U.S. 375 (70). *Studebaker v. Gittlin*, 360 F.2d 692, 697-698 (2-NY 66).

"Use of a solicitation that is materially misleading is itself a violation of law." *Mills*, supra, 383. A registrant whose material is questioned has a duty to act immediately if the challenge has validity. It may not wait to see if a lawsuit ensues. No lesser interpretation will foster the full disclosure principles of the Securities Acts.

The True Purpose of the Supplement Was Not Disclosed: Defendants would lose all credibility if they attempted to convince this or any other court that the true purpose of the supplement was other than to create a defense, and they have conceded as much.

Where, we ask, in the supplement, was this explained to the plaintiff shareholders? Having chosen to advise them of this lawsuit, respondents had the duty to make it plain that the purpose of the supplement was to create a defense. A fiduciary may not withhold material information. *Affiliated Utes v. United States*, 406 U.S. 128 (72). *Chris-Craft v. Piper*, 480 F.2d 341, 364 (2-NY 73) *rvsd. oth. gds*, 430 U.S. 1 (77).

The Purpose of the Supplement Was Falsified: Respondents went much further than mere advice of pendency. They prominently inserted three paragraphs beginning *"The Company believes that this action is totally without merit,"* [emphasis in the original], denying any false or misleading statement, claiming compliance with SEC rules and regulations and concluding "The Company is, *however*, sending you this letter consistent with *the Company's policy* to keep its shareholders *fully informed*" (PA 49).

The statement was patently false. Within 48 hours, the supplement was being argued in court as an injunction defense. Instead of a policy to keep shareholders "fully informed," respondents follow a policy of "tell only what you must." Instead of fostering higher standards of corporate accountability, the decision provides a handy tool for those who walk the brink of non-disclosure providing them a means to retrieve themselves, ex post facto, whenever their hand is called.

The defense of obviousness must be rejected. The primary purpose being the creation of a defense, it follows

that this is a case of false representation. A well established principle of general law declares gullibility of the victim is no defense to express fraud. Having elected to correspond with "Dear Shareholder" concerning the lawsuit, Chairman Kurshan had a fiduciary duty to tell both the truth and the whole truth; to disclose the true purpose of the letter. *SEC v. Parklane*, 558 F.2d 1083 (2-NW 77). Failing to do so, respondents should have been held to their declared purpose. The supplement should have been held inadmissible as a defense.

The Supplement Falsely Implied That the Complaint Had Been Fully and Fairly Summarized: This supplement, as always in the case of proxy solicitations, was meticulously drawn by a bevy of skilled executives, huddled with their lawyers and accountants; until every word was deemed to convey the proper impression; without an outright lie, for which there are stringent sanctions.

The "letter" states that it will not repeat plaintiffs' "subjective opinions," etc, and continues, "The Company is willing to disclose * * * the balance of the facts which the plaintiff claims were omitted or misrepresented" (PA 50).

"High standards of corporate ethics" obligated respondents to do as they represented, but clearly they did not fully and fairly meet the "balance" of the fact allegations. Petitioners filed with the District Court a list of 28 omitted specific fact pleadings (R. 52/76-80). Space restrictions limit us to examples. For instance, respondents advised the Courts below as follows: "The crux of plaintiff's claim was that the $10.50 redemption was less than the fair value of the C Stock * * *" (Df. 2 Cr. Br. 3; R. 47/11-13). Respondents were not nearly so frank with "Dear Shareholder." Nowhere is it disclosed that the complaint attacks the $10.50 mandatory redemption as unfair. All specific allega-

tions (12-24A) concerning unfair price are disregarded. "Dear Shareholder" was left to guess as to the "crux."

Where did they discuss the allegation that the financial statements in the proxy are of no assistance in determining the earnings and assets of GOCC because GOCC represented less than 20% of the consolidated entity? Where did they discuss the allegation that certified financial statements were omitted *even though reasonably available*? Where did they discuss the allegation that ever since the C shares were floated, respondents purposely omitted to distribute financial data relating thereto, *for the calculated objective of depressing market values*?

In short, the entire supplement was carefully constructed to illustrate the opening premise, "This action is totally without merit." If the supplement be compared to the complaint, it is obvious that any allegation casting doubt on the writer's premise was purposefully omitted or glossed over.

The supplement inferred a representation that the complaint had been reasonably summarized and fully answered. Inasmuch as it was not what it purported to be; inasmuch as it was calculated to mislead, it must be disregarded.

The Supplement Was Not Circulated Until the Last Minute: Regardless of the reasons, the supplement came too late to be effective. The vast majority of ballots ever cast were back in the mail before petitioner class could have received the supplement. After reading the originally expressed meeting date of August 10, shareholders had no hope of their vote being counted unless it was mailed by August 9 but the supplement could not have been received until August 7. In practice, no punctual shareholder

beyond the New York area received the supplement before his vote had been cast.[13]

Every lawyer knows the difficulty of persuading a Court to revise a decision once made. The situation in hand is comparable to a motion for new trial where the motion is delivered not to the tribunal but to the opposition, who is then permitted to argue reasons for denial whereas movant is never permitted to exhibit his motion or to appear and argue.[14] Timing assured that the supplement had no effect on the voting.

Complete Re-Solicitation Was Necessary: Registrants, being in control of the situation, must be induced to take care that their solicitations are adequate in the first instance. The statute and regulations are "remedial" and "prophylactic." *Mills v. Autolite, supra; TSC v. Northway, supra.* Re-solicitation was required in *Central Foundry v. Gondelman, supra*:

> "Placing the onus of obtaining restitution upon the misled stockholders is not here 'appropriate in the public interest' nor the relief best calculated 'for

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[13] "While this period (of delay in sending out the 'flyer') is not long * * * (in ordinary terms) it was of important significance * * * (to the proxy contest). The likelihood that the beneficial owners of the stock registered in the names of banks or brokers would receive the flyer in time to act thereon was problematical. That the * * * (shareholders residing beyond) the North Atlantic states, would even receive the 'flyer' in due time to act thereon was improbable; and as to the remaining stockholders the time for them to respond—at most five days—was unreasonably short, tantamount almost to depriving them of the opportunity to formulate and exercise an informed judgment." **Central Foundry v. Gondelman, 166 FS 429, 441-2 (SD NY 58).**

[14] "Coming so close to the * * * meeting date, the letter does not constitute timely notice * * * and cannot be an effective cure. * * * The requirement of affirmative action to change an initial commitment cannot as a practical matter produce the same corrective results as a new proxy." **Newguard v. Electro, supra.**

> the protection of investors.' The facts developed upon the hearings before this Court compel a holding that the proxies procured by the Committee are void. * * * Only thence will the stockholders be in the position before they acted in reliance upon the unlawful soliciting material." *Id.* 446-447.

As in *Gondelman*, none of the street name holders (those relying on banks and brokers to forward proxy material) could have received the supplement in time. The fact that August is the height of the vacation season is a consideration.

At the beginning, professional solicitors were paid $10,000 to contact petitioners and urge them to vote (PA 48). No one was similarly urged to consider the supplemental material. Many other cases have required a complete resolicitation. *Newguard v. Electro, supra; Dillon v. Berg*, 362 FS 1214 (DCDE 71), *affd. mem. op.* 453 F.2d 876 (3-DE 71); *Studebaker v. Allied*, 256 FS 173 (WDMI 76); *Union Pac. v. NW*, 226 FS 400 (NDIL 64); *Gladwin v. Medfield*, 540 F.2d 1266 (5-FL 76); *SEC v. May*, 229 F.2d 123 (2-NY 56) *affd.* 229 F.2d 123 (2-NY 56); *Berkman v. Rust*, 454 FS 787 (SDNY 78); *Willoughby v. Post*, 182 FS 496 (SDNY 60) and *Blanchette v. Providence*, 428 FS 347 (DCDE 77).[15]

Circumstantial evidence (the legalese equivalent of common sense) says that respondents, being advised by

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[15]Our case is miles apart from **Sonesta Intl. v. Wellington**, 483 F.2d 247 (2-NY 73) or **Corenco v. Schiavone**, 488 F.2d 207 (2-NY 73) where supplementation was **ordered** (emphasis). Presently, the supplement was circulated (1) behind the Court's back (2) for the purpose of creating a defense. We suggest those courts would have been wise to insist upon a look before the mailing, but that question is apart from the present one. Likewise, the opposition should have been given an advance look, but the point was waived by failing to object.

skilled consultants, considered the legal necessity (obviously, these fiduciaries pondered not concerning desirability or fairness) of a complete re-solicitation of proxies. On existing legal precedent, they gambled that the Court would not require re-solicitation, and, to this point, the gamble has paid off. The sustainer of respondents' deliberate choice to omit re-solicitation is again defeative of the statute.

It is not for us to say that re-solicitation must be imposed in every instance but we do urge that re-solicitation should be the rule, not the exception. This record does reflect trifling transgressions. The general rule must be that those who solicit in violation of the law, *Mills v. Autolite, supra*, may not retain the fruits of their infractions.[16]

The Court Was Deliberately By-Passed: Having chosen to defer supplementation unless and until suit was filed, there was only one way these corporate fiduciaries could have known "with certainty," that they were dealing

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[16]Respondents cannot claim expense as justification of the omission to re-solicit. The cost would be identical whether new and distinctive ballots or additional copies of old ballots be sent out, respondents choosing the latter (346-7A). Of course, if the shareholders were asked to re-submit their proxies, the solicitation company would desire another $10,000 for telephone canvassing, but the very absence of this extraordinary effort is a strong argument for voiding the supplement. Additionally, the $10,000 was nothing compared to the $33 million redemption price reduction sought to be imposed.

Re-solicitation would have required more time, but again, the fact that petitioner class was only given 7 days or less, after deducting round trip mailing time, to change their vote is an argument for avoidance. Further, what was the hurry? The so-called "reasons for proposed redemption" (38-41A) are tissue. "Flexibility" was the only reason found by the court (PA 6). Boiling away excess verbiage, the only solid reason stated was the possibility of operating economy from combined operations, but no combination was possible until payout of the overhanging debt; not then predicted to occur until July, 1980 (PA 26). Timing posed no problem whatever.

properly with their *cestuis*: by asking the Court to give prior approval to the contemplated supplement. Instead, defendants imposed their will, both upon those whom they were charged to protect and upon the Court.

(1) The complaint was pleaded as a class-action; every C shareholder was a putative opposing party represented by counsel. Respondents were negotiating with the opposing parties regarding a pending case without consent of Court or notice to opposing counsel. The class action mechanism does not constitute an exception to the rule forbidding such.

Defendants already had obtained counsel who had taken charge. The lawyers on both sides had engaged in preliminary negotiations. Most certainly, the "Dear Shareholder" letter was drafted and mailed in consultation with defense counsel. Counsel probably thought of the tactic. Certainly, they could not have written this letter on their own letterhead. It was equally improper for their clients to do so with consent (possibly at the suggestion of counsel).

(2) R. 23, FRCVP is urged as prohibiting such unilateral negotiation. The Court has a special duty to see that class members are adequately represented and no unfair advantage taken. *Re General Motors*, 594 F.2d 1106, 1124 (7-IL 79). It has frequently been so held between class members, named plaintiffs and plaintiff attorneys. One side of a lawsuit should not be forbidden to negotiate with the class and the other side left free. *Gulf Oil v. Bernard*, 452 U.S. 89 (81). In a securities action, either side desiring to so negotiate must be required to obtain advance consent so that the court will be in a position to see that all negotiations are fair.

On August 5, 1978, respondents declared to opposing

class members that the lawsuit, filed on behalf of the class being addressed, was "without merit." Opposing counsel of record, then acting for the entire class, had no opportunity to respond or advise as to the clients' best interest. Only respondents had a shareholder list. Prophylaxis demands that, R. 23 having been violated, the supplement must be disregarded.

(3) It is unlawful to solicit proxies without complying with the Securities Exchange Act and regulations. 15 USC §78n(a); 78j(b); 17 CFR §240.10b-5; §240.14a-9. There may be no solicitation without the imprimatur of the *proper* authority.

Like as not, a staff examiner did stamp the supplement, but respondents were confused as to the *proper* authority. The Court had assumed the SEC's jurisdiction. The Separation of Powers Doctrine prohibits administrative agencies from exercising jurisdiction over causes pending in Article III courts. *U.S. Const. Art. III* §§1, 2. When the Court stepped into the shoes of the SEC, the policy of the regulatory scheme was unchanged, but the *proper* authority to "pre-clear" supplemental solicitations was the Court."

Which authority is better equipped to pass upon a proxy dispute actually being litigated, the federal court or the routine review staff of the SEC? To ask the question is to answer it. Staff review is not an adversary proceedings and the SEC proxy clearance staff must yield to the

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[17]We think the Court took exclusive jurisdiction, but jurisdiction was, at least concurrent. Defendants had as high a duty to the Court as they had to the SEC; to-wit: obtain prior consent. The regulatory scheme made it mandatory that defendants have "pre-clearance" from each authority exercising jurisdiction. Any other interpretation gives the SEC greater power than the courts to deal with the res of a pending lawsuit.

expertize of the Courts.[15]

(4) Prior notice and the opportunity to be heard *before* action is taken are due process cornerstones of a case or controversy. With suit already pending, it would have been such a simple matter for respondents to ask permission to circulate a supplement. When respondents elected to act unilaterally, petitioners were deprived of important rights. Due Process prohibits a shifting of the burden of proof through ex parte action. *Armstrong v. Manzo*, 380 U.S. 25 (72). Respondents sought to cast upon petitioners the burden of proving unfairness of an accomplished fact. For such deprivals of constitutional dimension, the supplement must be declared void.

(5) Practice and procedure is largely judicial in origin. *Younger v. Harris*, 401 U.S. 37 (71) and numerous other cases are no more than statements of judicial policy. If the supplement was never cleared with the SEC, the Court would unhesitatingly declare it void. Does it comport with judicial policy to hold the SEC has a greater right regarding a pending lawsuit than the Court? We think not.

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[15]The fact that this is a securities case harmonizes **Gulf Oil v. Bernard**, supra. That **defendant** obtained an order restricting negotiations by named plaintiffs and plaintiffs' attorneys. An impermissible prior restraint was found. Presently, there can be no First Amendment issue unless the authority of the SEC itself be struck down. All we urge is that the Court assumed the powers of the SEC, which for years has required pre-clearance of proxy solicitations. Further, petitioners do not seek to prevent communications between registrant and shareholder. They may communicate at will but may not invoke ex parte negotiations had pendente lite as a defense.

Bernard is further distinguishable in that communications by plaintiffs rather than by defendants were in issue. That defendant apparently presumed the continued right to negotiate as it chose. The unfairness of having one party in a position to influence class members with the other party unable to do so is, in our estimation, at the core of the **Bernard** decision. The identical fundamental unfairness exists here making Bernard substantial authority for petitioners' position.

Commencing with the seminal decision of *JI Case Co. v. Borak*, 377 U.S. 426 (64) the Supreme Court has held the courts should be alert to provide the remedies necessary to effectuate the congressional purpose. A registrant, being the only active participant in the litigation with the facility to do so, must not be left free to unilaterally negotiate with the plaintiff-class *pendente lite* without consent of court or notice to counsel.

THREE: THE $17 MILLION ITEM PRECLUDES SUMMARY JUDGMENT

A registrant making a recommendation in a proxy solicitation is obligated to present sufficient facts to enable the shareholder to weigh its validity. For C shareholders, the original solicitation was waste paper; 42 pages of financials pertaining *only to MAI*. The midnight supplement contained a meager three pages (PA 52-4) of unaudited condensed statements.[19] They state "Due from affiliated companies . . . $16,803,781" (PA 54), but there is no explanation of this 75.48% of GOCC assets, the sole source of plaintiffs' $40 contingent payment.

At oral argument defense counsel replied "No, Your Honor" when asked if this item was explained in the supplement (PA 22). Respondents described the item as an "account receivable" in a supplemental brief filed thereafter and claimed that the item was outstanding prior to the 1974 re-organization (1049-53A) a fact not disclosed in either proxy. Respondents' position in oral argument and ensuing brief was that the $17 million item was not material in that repayment would not constitute cash flow to GOCC

[19]The complaint charges that audited statements of GOCC can be prepared at a minimum expense (13A). For summary judgment, the uncontroverted statement stands admitted. The failure to controvert was pointed out to Court and counsel 14 months prior to summary judgment but no attempt was made to alter the situation. (R. 52/128).

(PA 22-4). Petitioners argued that having three-quarters of GOCC's assets in a non-earning status, if such was the case, would be material (PA 29-31).

Finally, before the Second Circuit, respondents stated that the item had started off in 1974 as $13,514,648 and had never yielded any return to plaintiff-class (Dft. 2 Cr. Br. 25).[20]

Interest at 8% from the July 9, 1974 offering date through the September 25, 1978 redemption date amounts to $5,416,722. On November 26, 1980 respondents stated to the District Court: "The only major addition to this *account receivable* was in 1976 * * *" (1052A). Apparently $3,289,-133 was diverted from GOCC's productive assets during 1976. Interest from September 30, 1976 through September 25, 1978 is $567,249 for a total of $5,983,971, being $5.35 per share of diverted income. By July 24, 1982, the $5.35 had increased to $7.37.

There Was a 1978 Securities Violation: It has now been admitted that 75% of GOCC's assets were non-earning. A vast change in profitability and cash flow would result if the status of the $17 million item were changed. If the reasonable shareholder in considering the $10.50 redemption might have considered the matter important, a fact issue of material non-disclosure existed.

The non-earning asset was totally unmentioned in the June 27, 1978 solicitation, a clear infraction of the law. *Mills v. Autolite*, supra. In the wake of an unlawful solicita-

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[20]Interest is not the proper test. Bankers holding notes guaranteeing a fixed rate of return plus principal payments at a time certain, all secured by pledge of collateral are compensated with interest. Petitioners provided venture capital funds to affiliates and are entitled to pro-rata participation in the earnings generated. Rate of return is a matter to be decided after remand. Petitioners presently urge they are at least entitled to interest. The rate should not be less than 8%; the rate imposed upon petitioners in calculating the present value of C shares (PA 41).

tion, simple disclosure of the nature which originally might have sufficed is unacceptable. *Central Foundry v. Gondelman, supra.* Remedial disclosure is demanded, *Dillon v. Berg, supra,* sufficient to bring home to those relying thereon that the original disclosure was insufficient. *Dillon v. Berg, supra.*

The midnight supplement fails the ordinary test of disclosure. The fact that 17/22 of GOCC's assets were in the hands of affiliated companies was finally brought to light, but there was not one word as to how long the situation had existed. Neither does the shirt-tail summary of operations sufficiently confirm the non-earning nature of the asset. The schedule reflects heavy interest expense. Particularly in a condensed statement, it is an acceptable accounting practice to show interest as a combined net item. The summary further reflects substantial "miscellaneous" income which could have been payment for use of the $17 million item. There is a fact issue whether the reasonable investor would have so apprehended. "It is not sufficient that overtones might have been picked up by sensitive antennae of investment analysts." *Gerstle v. Gamble,* 478 F.2d 1281, 1297 (2-NY 73).

There Was a 1974 Securities Violation: Petitioners have also alleged a 1974 Securities violation in the flotation of the C shares (29A).

As now admitted, a major portion of GOCC's assets was then composed of "Due from affiliated companies." MAI had no plans either to restore GOCC's capital or pay compensation for its use. MAI, primarily through its Basic Four subsidiary enjoyed unbounded prosperity during 1975-78 but respondents took no action to return the $17 million or pay for its use creating a fact issue as to intent in 1974. Serious issues of out-and-out securities fraud are present.

A fact issue having been raised by respondents' own statements, controverting affidavits are unnecessary. *Adickes v. Kress*, 398 U.S. 144, 159 (70). On summary judgment, all inferences "must be viewed in the light most favorable to * * * "the opposing party." *United States v. Diebold*, 369 U.S. 654 (62).

In view of the admissions concerning 1974, the imposition of punitive damages, as pleaded, is amply warranted.

There Was A State Law Securities Violation: Where more than one class of stock is outstanding, corporate officers have a separate fiduciary duty to each class. *Lachman v. Bell*, 353 FS 37 (SDNY 72); *Schwartz v. Marien*, 37 NY2d 487 (75); *Zahn v. Trans-America*, 162 F.2d 36 (3-DE 47); *Box v. Northrop*, 459 FS 540 (SDNY 78) *affd.*, 589 F.2d 609 (2-NY 79).

We think it clear that state law placed a duty upon the officers of MAI to bargain on behalf of the C shareholders for a fair return on GOCC's assets so that the contingent payment rights of C shareholders would be meaningful.

Respondents have a poor record as to fiduciary responsibility. *Diamond v. Oreamuno*, 248 N.E.2d 910 (NY AP 69) involved the peculations of a former chief executive. Respondent Kurshan was Oreamuno's lieutenant and took over as chairman and president when Oreamuno was forced out by scandal. The history of the $17 million item poses questions whether the officers and directors of MAI have learned any lessons.

Even though the complaint alleges pendent claims of waste, mismanagement and breach of fiduciary duty (25-28A), respondents urged that any claim relating to the $17 million "is not one for a proxy action or a securities action," and that the same "is not part of this action" (PA 23-28). Petitioner responded, "This is a pendent matter" (PA 31).

By supplemental brief, respondents urged: "Reference to pendent jurisdiction is inapposite because * * * [after dismissal] no federal cause of action will remain to which his state law claim * * * can be pendent." (1040A).

In its decision, the Court gave scant attention to state law claims prompting petitioners to file for rehearing urging "The state law issues have not been fully developed" and ask that the dismissal thereof without prejudice (R. 70/3-4) to which the Court responded by assessing a $6,000.00 penalty for a "frivolous" motion (1132-4, 1151A).

On appeal, respondents executed a 180 degree turn urging that the trial court *did* have jurisdiction to rule upon the pendent claims (Dft. 2 Cr. Br. 34-37) prompting the Circuit to declare the "claim is frivolous."

We do not argue with the fundamental proposition to the effect that jurisdiction is to be determined from the pleadings and once jurisdiction attaches, it continues. The principle of "Our Federalism" is involved declaring that state courts should be deferred to regarding state matters.

Whenever a case is disposed of in its early stages, federal courts should "ordinarily" relegate the state law issues to the state court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (66). The petitioning class has not been provided a day in court on state claims. Preferably, the District Court should have retained jurisdiction and proceeded to trial, but at all costs, it should not have dismissed with prejudice in view of respondents' denials of the Court's jurisdiction and in view of the fact that the claims were not fully developed.

FOUR: PURPOSE AND INTENT ARE NOT SUMMARY JUDGMENT ISSUES

Petitioners contended in the lower courts that the within case is a classic squeeze-out or freeze-out; that the

real purpose behind the redemption was to prevent C shareholders from participating in a major expansion of the company's business then being planned.[21] Pursuant to SEC rules, the original solicitation contained three pages of supposed "Reasons for Proposed Redemption" (PA 38-41) of no substance. The courts below held in effect, that any such animus of respondents was, clearly and incontrovertibly, only a collateral consideration or an incidental motive citing *Rodman v. Grant*, 608 F.2d 64, 71 (2-NY 79).

Petitioners rely upon *SEC v. Parklane*, 558 F.2d 1083 (2-NY 77) holding that the true intents and purposes of control parties must be disclosed even if they do not directly bear upon the value of the security involved. The reason: Such information bears directly upon the validity of the recommendation given. If they have a special axe to grind, it must be disclosed. *Parklane* was approved in *Parklane v. Shore*, 439 U.S. 322 (79). Accord: *Gerstle v. Gamble, supra; Tanzer v. Haynie*, 405 FS 650 (SDNY 76).

Admittedly, there are many areas of the law (*e.g.* the criminal law) wherein purpose and intent are material issues whereas the law universally rejects inquiries as to motivation, either collateral or incidental. However, the distinction is, at best, a fine one.

Petitioners present an issue which was not considered in *Rodman* or *Parklane*. Both authorities agree that the

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[21] Plaintiffs presented the District Court with 11 items of circumstantial evidence indicating that respondents' purposes were not disclosed (R. 52/20) which cannot be repeated. Examples: the admission that ever since 1974, respondents purposedly omitted to distribute GOCC financial statements for the purpose of depressing the market; that in connection with this proxy solicitation, respondents omitted complete certified financial statements of GOCC which were reasonably available; and that respondents borrowed from banks at high interest rates to obtain the $10.50 redemption money whereas the C shares accrued nothing. The redemption did not make sound business sense except from a freeze-out standpoint. Also, see footnote 16.

state of mind of the issuer can become relevant in securities litigation. Petitioners urge that the issue is present here and the issues must be tried upon its merits. Our common law traditions do not permit trial by affidavit where the inference drawing function is involved.

As a general proposition, it is well established that purpose and intent are not matters for summary judgment. *Stonehill v. Security*, 68 FRD 24, 38 (SDNY 75); *Amer. Cyanamid v. Arden*, 331 FS 597, 606 (SDNY 71). See also *Fournier v. Canadian*, 512 F.2d 317 (2-VT 75) holding that summary judgment may not be used to try fact issues but may only determine if "there are fact issues to be tried". In *TSC v. Northway, supra*, 450, it was held that an issue may not be "appropriately resolved * * * by summary judgment" where reasonable minds might differ. See also *Perelman v. PA*, 432 FS 1298 (EDPA 77) (denying summary judgment: all doubts must be resolved in favor of the protected class).

As presented above, the reasons stated for the redemption are non-reasons. The heavy banking commitments which respondents made in order to accomplish this redemption simply could not justify any possible operating efficiencies generated. The failure to articulate significant reasons suggests that the true purpose was hidden. The petitioning class of C shareholders was entitled to a trial on the merits as to purpose and intent.

FIVE: THE FORFEITURE WAS IMPROPER

Mr. Justice Holmes once stated that the considerations in the judge's mind are often different from the reasons stated in his ruling. We believe the statement applies to the present case.

(1) By the nature of things, evidence in a securities

case lays in the enemy camp. If Judge Howell desired an injunction, he had to act quickly. Nevertheless, the District Court was greatly disturbed by the fact that witness Howell, at his deposition, taken within 3½ months after the original proxy mailing, was unable to fully document his allegations.

(2) Attorney Pattison does not claim perfection in the prosecution of the case. In mitigation, he would point out that he was hampered by distance limitations, by a shortage of expertise in securities litigation, and by personal problems (953-5; R. 69/Aft. 3-4). He was hampered in securing assistance and in proceeding by defense tactics. The Court contributed to his dilemma by failing to give any warnings, by failing to set a discovery schedule on cut-off date, by inferring in its March 18, 1980 ruling (957A) that no further summary judgment opposition would be allowed and by holding a motion for discovery time (961A) under advisement for 14 months and then denying it in connection with final judgment. Nevertheless, the Court was again greatly disturbed by counsel's failure to proceed with discovery at an earlier date.

(3) Judge Howell's "unsupported" allegations plus attorney Pattison's shortcomings in exercising discovery was the pervasive theme of the Court's decision. We are convinced that the Court was in a punitive frame of mind and that the summary judgment was primarily a forfeiture. Of course, "forfeiture" is a strong word which courts are reluctant to employ. For instance, courts often declare that rights have been "waived" for failure to timely object when the term "forfeited" is much more apt. In like vein, the Court cushioned its real grounds of forfeiture with other rulings that find little support either in the law or the record because it felt uncomfortable to simply declare the case forfeit and go no further. However, forfeiture was foremost in the Court's mind. Petitioners think that

the point was proved by the Court's strong reaction to the motion for rehearing wherein counsel suggested that the Court itself had delayed discovery (R. 70/5-7).

The theme of this issue, number five, is that the Court went too far. The penalty was not just $6,000. It amounted to millions, primarily assessed against innocent and unsuspecting persons, members of the plaintiff class.

Surely, the Court could have better controlled the situation. R. 23 FRCVP places upon the court an affirmative duty to monitor the adequacy of representation being received by members of the class at all stages. *Re: General Motors, supra* 1124. The Court below gave no warnings to counsel, set no schedules, made no recommendation that additional counsel be employed and possibly misled counsel by its own method of handling. Inasmuch as this is a securities case, the Court could have also asked for the SEC to investigate the merits or the adequacy of representation or even to intervene. Also available is the assessment of a penalty of the nature actually imposed (but without dismissal) and, as a next resort prior to dismissal, the dissolution of the class. *Alyeska Pipeline v. Wilderness,* 421 U.S. 240 (75); *Roadway Exp. v. Piper,* 447 U.S. 752 (80).

There is no indication that any of these available alternatives was considered. There wasn't even a hearing to determine if sanctions should be imposed. Instead, the entire case was forfeited without warning. The penalty is too great. The case must be remanded for consideration of reasonably available alternatives.

CONCLUSION

Certiorari to the Second Circuit should be granted.

Respectfully submitted,

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Counsel for Petitioners

IN THE

Supreme Court Of The United States

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYES,

Respondents.

PETITIONERS' APPENDIX

US COURT OF APPEALS, SECOND CIRCUIT; CHARLES BEN HOWELL, Etc., Et al. v. MANAGEMENT ASSISTANCE, INC., Et al; Nos. 81-7515, 7535, 7573.

[OPINION]

[Delivered Jan. 7, 1982; Not to be Published]

Before MOORE, KAUFMAN and VAN GRAAFEILAND, Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

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1. Howell may succeed in this appeal from the granting of summary judgment against him only by showing that he raised a "genuine issue as to [any] material fact," or that MAI is not entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The appellant submitted no affidavits alleging facts in opposition to MAI's summary judgment motion, and conceded that many of his allegations were based solely on conjecture. Accordingly, he has raised no genuine issue of material fact.

2. If there is either no substantial likelihood that a reasonable shareholder would consider the material important in deciding how to vote, *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), or the allegedly omitted information was in fact disclosed to the shareholders, *Rodman v. Grant Foundation*, 460 F. Supp. 1028, 1035-36 (S.D. N.Y. 1978), *aff'd*, 608 F.2d 64, 70 (2d Cir. 1979), summary judgment should be awarded to MAI as a matter of law. GOCC's $16.8 million intercorporate loan was amply disclosed in the Proxy Statement. Moreover, the Supplemental Proxy provided income tables reasonably indicating that GOCC received no interest on this asset. The Proxy and the Supplement prominently disclosed the Directors' substantial common stock holdings and potential conflicts of interest with Class C shareholders, in keeping with the S.E.C. rules then in effect. *See* Schedule 14A Item 5(e).

3. Howell also complains of the absence of GOCC financial statements; these were not required by the S.E.C. *See* Schedule 14A, Form 10, 17 C.F.R. § 249.210; *Gerstle v. Gamble-Skogmo*, 478 F.2d 1281, 1291-94 (2d Cir. 1973).

Nor were the financial statements important in light of the overriding significance of the Wordstream program, which was just getting underway. *See TSC Industries, Inc., supra.* Moreover, no disclosure of the Directors' motives in proposing a repurchase of Class C stock is required. *Rodman v. Grant Foundation,* 608 F.2d at 71-2 and n.5. None of the alleged omissions would add significantly to the materials disclosed, *General Time Corp. v. Talley Industries, Inc.,* 403 F.2d 159, 162-3 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969). Judge Stewart correctly found that there were no material omissions in the proxy materials.

4. This Court may condition approval of proxy materials on the filing of supplemental information. *See Sonesta International Hotels Corp. v. Wellington Associates,* 483 F.2d 247, 255 (2d Cir. 1973); *Corenco Corp. v. Schiavone & Sons, Inc.,* 488 F.2d 207, 214-15 (2d Cir. 1973). Thus, supplementation of this initial proxy was permissible, and Judge Stewart properly relied upon the contents of the Supplemental Proxy in granting MAI's motion for summary judgment.

5. A federal court may retain jurisdiction over pendent state claims that do not substantially predominate over the federal claims, *United Mine Workers v. Gibbs,* 383 U.S. 715, 726-27; *Rosado v. Wyman,* 397 U.S. 397, 405 (1970), and it may dismiss such claims with prejudice on a motion for summary judgment, *see Ryan v. J. Walter Thompson Co.,* 453 F.2d 444 (2d Cir. 1971), *cert. denied,* 406 U.S. 907 (1972). Judge Stewart properly dismissed the claims for breach of fiduciary duty with prejudice. Howell's argument rests on a bald misstate-

ment of a clear principle of law; thus, his claim is frivolous.

6. Since Howell omitted to put in affidavits in response to MAI's motion for summary judgment, although he was given ample time for discovery, the court correctly found that it was without sufficient basis for concluding that further discovery would raise a genuine issue of material fact. F. R. Civ. P. 56(f); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981). Accordingly, Judge Stewart properly denied Howell's application to defer summary judgment. *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827, 831 (2d Cir. 1958).

7. Judge Stewart's decision is affirmed in all other respects.

US DISTRICT COURT, SD NEW YORK, CHARLES BEN HOWELL, Etc., Et al. v. MANAGEMENT ASSISTANCE, INC., Et al; No. 78 Civ. 3516 (CES)

MEMORANDUM DECISION
[Filed May 4, 1981; 81 CCH F Sec ¶98,245]

STEWART, District Judge: Plaintiff, an owner of 275 shares of Class C Preferred Stock of defendant Management Assistance, Inc. ("MAI") commenced this class action on August 1, 1978 seeking to enjoin defendants from voting proxies solicited by a proxy statement mailed to all stockholders of MAI on June 28, 1978. The proxy statement was issued in connection with MAI's proposed redemption of the Class C stock.

The complaint also seeks to enjoin the proposed redemption and damages for violation by defendants of the Securities and Exchange Act, §§14(a) and 10(b), 15 U.S.C. §§78n(a) and 78j(b)[1]. The gist of plaintiff's claim is that the proxy statement was deceptive and misleading in that it failed to disclose information which would establish that the redemption price was too low.

The complaint was accompanied by an order to show cause seeking a temporary restraining order and a preliminary injunction of holding the stockholders' meeting which was scheduled to be held (and was held) on August 10, 1978. On August 5, 1978, MAI mailed a Supplementary Proxy Statement to its stockholders advising them of plaintiff's lawsuit and containing additional information relating to those matters as to which plaintiff asserted misrepresentation or non-disclosure. After hearings, we denied the motion for temporary and preliminary relief (Memorandum Decision dated August 10, 1978) and the Court of Appeals on August 17, 1978 denied plaintiff's application for a stay of the stockholders' meeting. At the meeting, the stockholders overwhelmingly approved the proposed redemption.

In June 1979, plaintiff's motion to certify a class, as expanded by defendants' cross-motion to certify a broader class, was granted. The class was thereafter given appropriate notice. Discovery by defendant has included taking the deposition of plaintiff in October, 1978 and requiring the production of documents by plaintiff. On the other hand,

[1]Plaintiff also asserts causes of action under state law for fraud and conversion, based on pendent jurisdiction.

plaintiff has engaged in no discovery.[2] In December, 1979, defendants moved for summary judgment. Oral argument (on the motion) was heard in November, 1980. We now grant the motion and dismiss the complaint.

The proxy statement in issue dated June 27, 1978, was sent by MAI to its stockholders on June 28, 1978. Under the certificate of incorporation, the company was obliged to redeem the Class C Preferred Stock for $10.00 per share in four annual installments of $2.50 per share payable in the years 1981-84. The stock was entitled to a contingent dividend in the maximum amount of $40.00 per share which was based upon a specified percentage of Cash Flow From Operations (as defined at p. 63 of the proxy statement) of defendant Genesis One Computer Corporation ("GOCC"), which is a wholly-owned subsidiary of MAI. Since the issuance of the Class C stock in 1974, contingent dividends in the amount of 40 cents had been paid (32 cents in 1976 and 8 cents in 1977). The proxy statement set forth management's belief that no funds would be available for dividends on the stock in 1978.

In order to provide more flexibility for future business operations, according to the proxy statement, the company proposed to redeem the preferred in the immediate future for $10.50, subject to stockholder approval at a meeting scheduled for August 10, 1978.

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[2]Plaintiff noticed the deposition of defendant Kurshan in the fall of 1978. Magistrate Sinclair deferred "for a short period" the deposition pending further action on the class action motion, noting in his order (dated October 4, 1978) that defendants "have not opposed producing Mr. Kurshan with reasonable dispatch at an appropriate point". Plaintiff at no time thereafter sought to depose Kurshan. Plaintiff also filed a request for production of documents on March 31, 1980 after the motion for summary judgment, discussed herein, had been submitted. Defendants filed various objections thereto on April 29, 1980. Plaintiff has taken no action with respect to these objections.

Plaintiff filed its complaint on August 1, 1978. On August 5, defendants mailed a Supplementary Proxy Statement to the stockholders advising them of the complaint, asserting that it had no merit, but setting forth additional data which the complaint alleged was necessary to make the proxy statement not misleading. The Supplementary Proxy Statement also stated that the polls would remain open until August 18, 1977 so that stockholders would have adequate time to consider the new material and could, if they desired, change their vote.[3] The shareholders voted to approve the redemption proposal of the outstanding Class C shares, 87.96 percent of Class C stockholders voting for and 2.93 percent against redemption; of the outstanding common stock, 66.89 percent voted for and .89 percent against.

Defendants attach to the motion for summary judgment extensive affidavits and exhibits asserting factual data with respect to the matters challenged in the complaint. Defendants also rely heavily upon the lengthy deposition of plaintiff, which is replete with concessions by plaintiff that he had no factual basis to support particular charges, including the fraud allegation, in the complaint.

In opposition to the motion, plaintiff filed after several adjournments an incomplete draft brief. Later, after defendants had filed a reply brief, plaintiff untimely filed a completed brief (which we have considered despite its untimeliness). Finally, plaintiff thereafter filed an application asking that proceedings on the motion be held in abeyance while plaintiff conducted discovery in an effort

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[3]Proxy cards and a stamped, return envelope were enclosed for this purpose.

to raise factual issues with respect to the fact matters set forth in defendants' affidavits.

No affidavits as to factual matters were offered by plaintiff in response to the motion for summary judgment nor has plaintiff provided us with any basis for concluding that discovery at this late date would be reasonably likely to produce relevant information which would raise questions of fact sufficient to require denial of the motion. The application is therefore denied.

Turning to the motion for summary judgment, plaintiff has failed to establish a genuine issue as to any material fact. No affidavit of fact was submitted in opposition to defendants' affidavits. In his deposition, plaintiff conceded on numerous occasions that various allegations of the complaint were based solely on conjecture and speculation. Indeed, plaintiff's answering brief (p. 81) states that "[e]xtensive discovery will be required to establish truth or untruth of all of plaintiff's fact allegations" and (p. 28) that only after discovery "will it be determined how close plaintiff Howell and his attorney came to the true facts".

Consequently, plaintiff may succeed in its opposition to the motion only by showing that defendants are not "entitled to judgment as a matter of law" (Rule 56, F. R. Civ. P.). Plaintiff's claim is basically that the proxy statement and the supplementary proxy statement were misleading in failing to disclose allegedly material facts.

Initially, it is contended that the supplementary proxy statement is illegal and void because it was sent to stockholders without the court's consent after this action had been commenced. We are aware of no impropriety in defendants' issuance of the supplemental statement, which was

considered at the hearing on the motion for a preliminary injunction, and upon which we relied in part in denying the motion. The purpose of a proxy statement is, of course, to put before stockholders all facts necessary for an informed decision. Where, as here, the supplemental statement contributed to this objective and did so in a proper manner, the absence of court approval would seem immaterial. Courts have conditioned approval of proxy statements on the filing of supplements, *see Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 255 (2d Cir. 1973); *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 214-15 (2d Cir. 1973); and have approved over claims of non-disclosure proxy statements which were supplemented after the commencement of litigation, *see Lessler v. Dominion Textiles, Ltd.*, 411 F. Supp. 40, 42 (S.D. N.Y. 1975); *Abramson v. Nytronics, Inc.*, 312 F. Supp. 519, 523-26 (S.D. N.Y. 1970).

Plaintiff also complains that the supplemental proxy statement should be disregarded because it did not involve resolicitation of proxies. The stockholders' meeting had been fixed at August 10, 1978 by the proxy mailed on June 28. After this action was commenced on August 1, the supplemental statement was mailed on August 5. It prominently stated that the polls would be kept open until August 18 and that stockholders could file their proxies, change proxies previously filed or re-submit new proxies until that date. As we found at the hearing on the preliminary injunction, this procedure adequately and fairly protected the stockholders.

This is not a case like those relied upon by plaintiff which involved affirmative misrepresentations or crucial omissions to disclose material facts. In *Newgard v. Electro-*

Nucleonics, Inc., [1976] FED. SEC.L.REP. (CCH) ¶95,805 (S.D. N.Y. 1976), for example, the company prominently and optimistically mentioned in its Annual Report mailed to stockholders with proxy materials a joint venture in which it was involved. Information critical to the likelihood of the success of the joint venture was obtained by the company before the proxy materials were mailed but was omitted therefrom and from a subsequent supplement to the proxy materials. The inclusion of the material in a second supplement was held to be an ineffective cure of the early omissions. Here, as indicated below, there were no deliberate nor material omissions from the initial proxy. In any event, the supplement gave sufficient, reasonable notice to stockholders to permit any who wished to change their vote to do so.

Plaintiff argues that the proxy materials are defective for failure to disclose defendants' "true names [quare — aims] and purposes" — that is, to "freeze-out" Class C shareholders. The Argument has no merit. The materials clearly disclose that the result of the proposed redemption, if approved by the stockholders, would be to freeze-out or eliminate Class C stock. As stated in *Rodman v. Grant Foundation*, 608 F.2d 64, 71 (2d Cir. 1979), "[h]ere the proposed actions of the company and their effect on stockholdings were fully disclosed". The Court in that case at 608 F.2d 71, n.5, distinguished *SEC v. Parklane Hosiery Co.*, 558 F.2d 1083 (2d Cir. 1977) where "there was 'not so much as a hint' of [the material facts] in the proxy statement".

Plaintiff's central contention is that the proxy and supplemental proxy statements failed to inform the stockholders of the facts necessary to enable the stockholders to make an informed decision as to whether the price to redeem the

Class C shares was fair. In particular, plaintiff contends that insufficient financial information was provided with respect to GOCC. Dividends were payable to Class C shareholders only from and to the extent GOCC had "Cash Flow From Operations". As the proxy statement indicated, the ability to pay such dividends was dependent in management's view on the future success of the Wordstream operation which had been acquired in October 1977. Substantial information with respect to this operation and other ongoing operations of GOCC was furnished in the proxy statement (pp. 4-8) as well as extensive financial statements of MAI on a consolidated basis. The supplement contained financial statements and other financial data with respect to the subsidiary, GOCC.

We conclude that defendants provided sufficient information to the shareholders to enable an informed decision. No material non-disclosure has been placed in issue. We turn now to the particular allegations in the complaint:

1. The complaint alleges in paragraph 18, 19 and 20 that the proxy statement is misleading for failure to include financial statements of GOCC. Defendants contend that no such statement of GOCC, a wholly-owned subsidiary, are required by the SEC, Schedule 14A, Item 15 (17 C.F.R. §240.146-101) and Form 10, 17 C.F.R. §249.210. To the extent that the SEC may under Form 10, Subpart D, require such statements, none were sought or required by the SEC. Moreover, financial statements with respect to GOCC would be of limited, if any, significance with respect to the possible future Cash Flow From Operations of the subsidiary, since its ability to earn money to pay Class C dividends depended primarily on the new Wordstream program which was then just getting underway. In any event, such

statements were included in the supplemental proxy statement.

As to the supplement, plaintiff contends that the financial statements of GOCC should have been certified. Since these financial statements were not required by the SEC rules, there is no SEC requirement of certification.[4] Moreover, plaintiff in his deposition conceded that, other than the absence of balance sheets for the years 1975 and 1976,[5] there is nothing "in the financial information provided which is false, fraudulent or fails to include and contain material facts" (Tr. 372-73).[6]

2. It is claimed in paragraphs 21-23 that there was inadequate disclosure of bias or conflict of interest on the part of the directors, and especially Kurshan, Chairman of the Board and President, and defendant Berend, Senior Vice President, because of their substantial holdings of common stock. The common stockholders stood to benefit financially from the proposed redemption. The first page of the proxy statement prominently discloses that the directors as a class owned approximately 36 times more shares of common than of Class C stock; the supplementary proxy disclosed the individual holdings of each director.

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[4]Unaudited statements were reviewed by the Court of Appeals in **Corenco Corp. v. Schiavone & Sons, Inc.**, 488 F.2d 207, 216 n.11 (2d Cir. 1973). Defendants' counsel points out in its Memorandum in Support of their Motion for Summary Judgment, p. 49, n.22, that all subsequent amendments made to the financial statements at the request of the SEC were unaudited, but were accepted and filed.

[5]The omission of such statements was not material since sufficient data on those years was provided and especially since the Wordstream program was not acquired until September, 1977.

[6]Other examples in the deposition of plaintiff's admissions of baseless allegations, speculations and lack of information are at Tr. 51-57, 226-28, 247-50, 283, 291-92, 294-97, 304-306, 311-12, 337-38, 343.

The proxy statement also fully and prominently disclosed the potential benefits available to common stockholders as a result of the redemption. The disclosures in the proxy statement, even without the individual data in the supplement, were sufficient and in compliance with the SEC Rules then in effect.

3. In paragraphs 24-29 of the complaint, plaintiff in substance alleges that there was a failure to include (1) substantial expenditures by GOCC in development of the G-Series and new Wordstream products; (2) data with respect to benefits the Class C stockholders would have obtained if certain notes which were scheduled to be retired on or before July, 1980 had been retired prior to 1976; and (3) pro forma cash flow statements showing what GOCC's cash flow earnings for the years 1976-1978 would have been if the alleged development expenses were included and the notes had been retired in 1976. It is contended that these omissions created a false picture as to the ability to pay Class C dividends in the future.

In fact, the defendants' undisputed affidavit shows that a substantial amount of the Wordstream development work which was conducted was not paid for by GOCC, and so had no effect on the funds from which dividends would be payable to Class C. The cost of acquiring the Wordstream system, which was incurred by MAI, is included in the proxy statement at page 55, the substantial scope of the development of the Wordstream marketing and sales operation is set forth on page 6 of the proxy statement, and expenses in connection with the start-up of the program are set forth on page 2 of the supplement. The Berend affidavit states that no material amounts were spent by GOCC for developing any other new products.

With respect to the note payments, the facts were fully set forth in the proxy statement, and accordingly the hypothetical calculation which plaintiff claims should have been set forth was unnecessary. In any event, the supplement at page 3 spells out the effect the retirement of the notes will have on the funds available for Class C dividends.

As to the claim relating to the lack of hypothetical pro forma cash flow statements, we think it is frivolous. In any event such cash flow calculations could be easily made, as plaintiff testified he had done, from the data in the proxy materials which specified the amounts of development expenses and debt payments incurred in those years. Moreover, defendant Berend's affidavit states, without contradiction, that the actual results for fiscal years 1978[7] and 1979 precluded the payment of any Class C dividends (Affidavit, p. 30 n.23, as supplemented by letter from defendants' counsel dated January 8, 1980).

4. In paragraphs 30-36, plaintiff complains of the absence of information with respect to GOCC's three principal lines of business and the omission of information concerning probable future profits. Specific financial data, however, was included in the proxy statement with respect to the two older lines, G-Series products and unit record equipment, and substantial and pertinent information on the new Wordstream system, its development and plans for the future. Additional financial data on the two older products was included in the supplement, which confirmed that, despite an increase in sales, gross profits on G-Series products had declined approximately one-third since 1977; also, the data shows that on unit record equipment gross profits and sales declined 50% from 1976. Plaintiff alleges

[7]At page 5, the proxy statement said it was "unlikely that any dividend would be payable for fiscal 1978".

in paragraph 35 that "defendants have spent at least $5,000,000 entering" the Wordstream business, that defendants "have fixed plans and commitments to spend at least an additional $10,000,000" and "that profit margins presently exceed 25%." In fact, the proxy statement contains detailed information (p. 55) on the cost of entering the Wordstream business. At his deposition plaintiff stated he had no basis for the figure of $10,000,000 (Tr. 304). The reference to 25% was based, according to paragraph 35, on "inquiry in trade circles". Plaintiff conceded at his deposition he had not made and that he knew of no "inquiry in trade circles" (Tr. 306). Projections as to possible future profits were not made. Any such projections would have been unreliable at best, in light of defendants' very limited experience with the program. The fact that for this reason no projections would be included in the proxy materials was made known to the SEC during its review of the proxy statement and it did not suggest that any projection should be made. *See General Time Corp. v. Talley Industries, Inc.*, 403 F.2d 159, 163 (2d Cir. 1968). Plaintiff's assertions in paragraph 35 of the complaint with respect to projections, profit margins and planned future expenditures are, he cheerfully conceded at his deposition, in essence pure speculation.[8]

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[8]In his brief, plaintiff points to the item of $16,800,000 which is listed in the GOCC balance sheet in the supplement as "Due from affiliated companies". Plaintiff contends that there was inadequate disclosure in this respect, speculating that these amounts were diverted "to minimize the obligation to 'C' shareholders". No factual information by affidavit or otherwise is offered in support of this speculation. There was, of course, disclosure of the amount owed to GOCC. The proxy materials, moreover, disclose that the repayment of these amounts would not be available to the Class C stockholders as dividends, because they would not be included in "Cash Flow From Operations". Nothing plaintiff has presented as to this item supports his position that he is entitled to discovery nor that there is an issue here sufficient to defeat summary judgment.

5. Paragraphs 37 and 38 rely upon an alleged commitment described in the complaint as an "illusory promise" in a 1974 MAI registration statement to have one of its domestic subsidiaries make a securities offering. The 1974 statement is attached to defendant Berend's affidavit. It discloses that no such commitment was made.

6. Equally without merit is the claim in paragraph 39 that the redemption proposal was a tender offer and should have complied with the Williams Act tender offer rules. 17 C.F.R. §240.13e-1.

7. Plaintiff asserts in paragraphs 40 and 41 that certain large Class C shareholders who also owned common stock should not be allowed to vote on the redemption proposal. This proposal squarely conflicts with the requirements of Section 612(a) of the New York Business Corporation Law, applicable here, and New York law. *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 296 (1906); *Lord v. Equitable Life Assur. Soc.*, 194 N.Y. 212, 228-29 (1909).

8. Finally, Counts 42-48 charge, with limited or no specificity, fraud and deceit. Count 49 charges conversion based on the acts alleged in Counts 42-48. The alleged fraudulent scheme consisted of conduct shown not to have occurred or not to have been fraudulent by the unanswered affidavits. Typically, plaintiff conceded in his deposition that he had no knowledge or information to support the allegations of misconduct in paragraph 47 and that other fraud allegations were "matters of inference and deduction" (Tr. 55-57).

Accordingly, plaintiff has failed to establish that defendants are not entitled to judgment as a matter of law.

Defendants have counterclaimed, seeking attorneys' fees as well as costs and other expenses. They contend that

the action was brought in bad faith, was based on claims entirely without color, and was motivated solely by plaintiff's desire to obtain a favorable settlement for himself. Defendants point to the fact that plaintiff first communicated with defendants in a brief letter dated July 12, 1978 in which he advised that he was preparing to file a suit within one week to enjoin the August 10, 1978 stockholders' meeting. The letter goes on to state: "However, before doing so, we feel that the possibilities of settlement should be explored in order to protect the company from adverse publicity." After the action was brought, plaintiff proposed a form of settlement which would avoid notice to the class (letter of September 1, 1978).

Although we have concluded that this action is devoid of merit, we are not persuaded that the defendants are entitled to an award of attorneys' fees. The filing of the lawsuit brought about the supplemental proxy statement which, although perhaps unnecessary, did provide additional information. Accordingly, this application by defendants is denied.

The motion for summary judgment is granted and the complaint is dismissed with costs for the defendants.

SO ORDERED (1101A).

MEMORANDUM DECISION

[AND ORDER OF THE DISTRICT COURT]
[Filed June 11, 1981; Not to be published]

STEWART, District Judge: Plaintiff has filed a motion asking for various forms of relief from our decision dated May 4, 1981, each of which is dealt with as follows.

Plaintiff seeks fees "for services in compelling defendants" to submit the supplement to the Proxy Statement. Plaintiff relies on the language in our decision to the effect that "[t]he filing of the lawsuit brought about the supplemental proxy statement which, although perhaps unnecessary, did provide additional information." We perhaps too generously considered the fact that this additional material was provided to the shareholders in deciding not to charge plaintiff with attorneys' fees in what was otherwise a compelling case for the imposition of sanctions. We in no way consider plaintiff to be a prevailing party, and plaintiff is not entitled to or deserving of fees. The application is denied.

Plaintiff also applies for attorneys' fees because defendants joined in plaintiff's motion for class certification before bringing the motion for summary judgment. It is disingenuous at best for plaintiff to seek fees from defendants for obtaining the dubious "benefit" of losing a class action and thereby binding the class plaintiffs to a determination in defendants' favor. Moreover, we have found the action was without merit and was based on surmise and speculation. As the Second Circuit noted in an earlier case, "plaintiff anomalously count[s] it as a benefit that he exposed the corporation to litigation expense and notoriety in an effort to erase the risk that others might do the same thing." *Schectman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957). This application is also denied.

We considered the state law claims in our decision on the merits and rejected them. We decline to grant plaintiff's request that they be dismissed without prejudice.

The renewed application to give plaintiff time for discovery is denied for the reasons set forth in our decision.

Plaintiff had ample time to pursue discovery and failed to do so.

The motion for a "rehearing or new trial" under Fed. R. Civ. P. 59 (which, incidentally, is not applicable) is denied.

Defendants have moved for an award of attorneys' fees incurred in opposing the instant motion. Plaintiff's motion is, in our view, frivolous and wholly without merit. Accordingly, defendants are awarded attorneys' fees incurred by them in opposing this motion. SO ORDERED.

[1123A-1125A]

[JUDGMENT OF THE SECOND CIRCUIT]

[Same judges, case name and numbering as before; filed Jan. 7, 1982]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

[ORDER OF THE SECOND CIRCUIT DENYING REHEARING]

[Same judges, case name and numbering as before; filed Feb. 24, 1982]

A petition for a rehearing having been filed herein by counsel for the appellant, Charles Ben Howell, etc. Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

[JUDGMENT OF THE DISTRICT COURT]

[Same district, case name and numbering as above; filed May 18, 1981]

Defendants having moved for summary judgment and the said motion having come before the Honorable Charles E. Stewart, United States District Judge, and the Court thereafter on May 12, 1981, having handed down its memorandum decision denying defendants' application for attorneys' fees and granting defendants' motion for summary judgment dismissing the complaint with costs for the defendants, it is, ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed with costs for the defendants, and it is further, ORDERED: That the defendants' application for attorneys' fees be and it is hereby denied.

[1122A]

[JUDGMENT OF THE DISTRICT COURT]

[Same district, case name and number as above; filed July 29, 1981]

Plaintiff having moved to amend, set aside and for a rehearing of the summary judgment entered herein on May 18, 1981, and said motion having come before the Hon. Charles E. Stewart, United States District Judge, and the Court thereafter on June 11, 1981 having handed down its Memorandum Decision denying said motion and awarding to defendants attorneys' fees incurred by them in opposing said motion, and

Defendants having moved for an order directing the entry of judgment against plaintiff awarding to defendants the amount of $9,519.00 in attorneys' fees incurred by them in opposing plaintiff's motion to amend, set aside and for a rehearing of the summary judgment previously entered herein, and defendants' motion having come before the Hon. Charles E. Stewart, United States District Judge, and the Court thereafter on July 21, 1981 having handed down its endorsement directing the entry of judgment against plaintiff awarding to defendants attorneys' fees in the amount of $6,000.00, it is

ORDERED, ADJUDGED AND DECREED that defendants' motion for an order directing the entry of judgment against plaintiff for attorneys' fees is granted in the amount of $6,000.00 and plaintiff Charles Ben Howell is directed to pay to defendants the amount of $6,000.00 plus interest at the rate of 9% per annum.

[1152A]

[ORAL ARGUMENT BEFORE THE DISTRICT COURT]

[Same district, case name and number as above; Nov. 10, 1980; Mr. Pattison for plaintiffs, Mr. Walpin for defendants]

THE COURT: [STEWART, J.] * * * Mr. Walpin, here is how I would like to proceed: I have a document that was filed on March 25th entitled * * * "Plaintiff's Memorandum in Support of Cross-Motion to Defer Summary Judgment Proceedings Pending Discovery." On page 8 of that memo, the plaintiff lists ten points on which he says he needs discovery. * * * I have some questions I wanted to ask you about those points.

* * *

[THE COURT]: On page 8 of what I will call the brief asking for discovery, under paragraph 1, the plaintiffs say that you have admitted that your clients admitted [quare — omitted] to disclose the real purpose behind the redemption of the C shares, * * * Item 2 talks about $17 million of Genesis One's total assets being due from affiliated companies and no explanation was offered as to that amount. I am concerned about that.

* * *

THE COURT: Yes. But what made up the $17 million? Was that disclosed?

MR. WALPIN: *No, Your Honor.* The fact that there was an account receivable from affiliated companies was not disclosed, but I have this to say about that: First of all, the fact that there is an account receivable does not by itself indicate that it has any relevance to cash flow from opera-

tions. The plaintiff has had an enormous amount of time to get discovery, * * *

THE COURT: I understand that. But why do you think affirmatively — do you have anything to say why it wouldn't be material?

MR. WALPIN: Your Honor, cash flow from operations is defined in the proxy statement and does not cover money previously in the till which was thereafter advanced to affiliated companies by Genesis.

The repayment of monies previously in the till — obviously an advance has to be some sort of taking out of the treasury of Genesis to loan to, to use a synonym there, the parent or affiliated companies. A return of the loan is not cash flow from operations under the definition and, therefore, what I am saying is since the definition of cash flow from operations is included in the proxy material, since the fact of a $17 million advance was already indicated in there, it can be seen by anyone that it is not something which would by itself increase dividends on repayment from the affiliated companies.

The other point made by the plaintiffs in their papers as purporting to be a basis for materiality is that Genesis was utilizing its own funds, a substantial amount, they say, $17 million, for the assistance of operations of affiliated companies, and *their point is* and they concede in their papers that *that is a question of waste, alleged waste* — I don't want to claim that it is — but *alleged waste and misuse of the funds of* GOCC for the benefit of the affiliated companies.

The two answers to that is, that was disclosed. To the extent there is anything to that theory, that was disclosed

to the shareholders, the fact that money in the till of GOCC was being advanced or had been advanced to affiliated companies and, secondly, as plaintiffs concede in their papers, and I know, Your Honor, we have made the point, *any allegations of waste or mismanagement is not one for a proxy action or securities action.*

So too, if I may, just summarize my position in answer to Your Honor's question, and I will be glad, of course, to answer anything further on that, the advance itself, the fact there was an account receivable was fully disclosed. Since the definition of cash flow from operations is also disclosed and advance is not covered by that, that is, a repayment of advance is not covered by that, not within the definition, it by itself would not lead to dividends on the repayment and, therefore, there has been full disclosure of those facts as necessary.

With regard to the claim that GOCC shareholders should have known that there would have been more money available to invest and make money for the C shareholders if GOCC had not advanced these funds to the affiliated companies, that was disclosed and, secondly, *that is a waste and mismanagement allegation which is not part of this action.*

Finally, Your Honor, I do go back to the general point we have made that I won't belabor because I know Your Honor is familiar with it, on a motion for summary judgment, the plaintiff has the responsibility not just imaginatively and ingeniously to pick over everything and say, "Here is an area we would like to do some discovery in," but has to show Your Honor that there is something there which discovery would produce which would be material, and we have absolutely not a word, not an affidavit, not

an allegation, all we have is the plaintiff's own admission that he knows of no witness who could come forward at this time to support their case and that he wants to obtain discovery merely to find out if there is anything to his allegations.

* * *

THE COURT: Okay. The next point I have is if you will turn to page 16 of the supplemental brief, the big one. * * * Item 8, which talks about defendants having spent $5 million getting into the Wordstream business, and that defendants had fixed plans and commitments to spend at least an additional $10 million * * *. Once again, I would like to know why you think there was adequate disclosure.

* * *

[MR. WALPIN]: What we have here is a proxy statement which sets forth the actual dollars already spent — and by proxy statement I am including the supplementary as well — plus a clear statement that MAI believes that the Wordstream project is an important one and will be the successful one, indicating it will spend as much as necessary to make that so, but the proxy statement could not put in the figures with regard to had spent at least $5 million, because that was not so.

* * *

[MR. WALPIN]: Any allegation that there was an intention to spend $10 million more, I believe plaintiff conceded he had no basis for that and no facts to support it. It is just a number picked out of the plaintiff's head for a complaint, as he indicated a lot of it is just guesswork.

* * *

THE COURT: — about this point, the $5 and $10 million, the second paragraph, the second sentence, he says, "The C stockholders were entitled to know the size of the expenditures and the commitments made so that the stockholders would be in a position to evaluate possible future cash flow income from this source."

MR. WALPIN: Your Honor, my answer to that is threefold: * * * The supplementary proxy statement contained the specific dollars already spent by GOCC and by affiliated companies, even though the affiliated companies' expenditures did not in any way affect cash flow from operations.

There is no basis to say, and the plaintiff has not set forth any facts and conceded, I believe, he had no facts to support this claim of $10 million anticipated spending.

Thirdly, the proxy statement and the supplementary proxy statement made clear without regard to a specific dollar amount as to what will be invested in the future in Wordstream, that the hope of success of GOCC, whose name was then changed to Wordstream, depended upon the success of Wordstream and that MAI and GOCC would be doing everything necessary in order to make that a success so that it could give off substantial income.

* * *

[THE COURT]: Item 6, plaintiffs complain or at least point to the fact that the proxy said not later than July 10, 1980 and, in fact, it happened in September of 1979 and they want discovery with respect to that point. What do you have to say to that?

* * *

[MR. WALPIN]: The terms and provisions of the overhanging debt which plaintiffs say they want have —

THE COURT: That isn't quite what they want. They don't want the terms of the debt. They know what the terms are, I think. * * * They want to know why you said not later than July 10, 1980, when it happened nine or ten months sooner, in September 1979, that the payout status was reached.

* * *

MR. WALPIN: Your Honor, I think that we are all familiar with debts and the fact that there are many factors that come in the question of whether you pay *in advance* a debt that is due on July 10, 1980 or whether you wait until the last minute to do so. One of those factors obviously is interest rate. Another factor is the ability to utilize the assets of the company without restriction and to be able to use the financial facilities of MAI, which was one of the purposes set forth in the proxy statement.

THE COURT: I suppose the plaintiff's point is — maybe I am assuming too much. Their point, I take it, is in August of 1978 you should have been in a position to know that it would be possible to reach payout status sooner than July 10, 1980 and to have some notion as to when that might be and, secondly, that this was significant.

MR. WALPIN: Your Honor, it is my position that when you say you have a debt, and that may be, for example, a mortgage on a house, and this is very similar, if you are deciding that you wanted that house free and clear so that you could do with it as you please, everyone knows that a debt that is payable not later than a given date can be paid before, unless there is a specific prohibition against advance payment.

* * *

THE COURT: All right. Thank you. On page 10, item 7, [of plaintiffs' brief asking for discovery time] is there anything you would like to say with respect to that, [plaintiffs' proposition that] Genesis wasn't allowed to make as much money as it should have because it was forced to absorb all other competitive price reduction necessary to market the G series terminals? * * * I take it the thrust of that is prices had gone down in this area and they should have been given the same break others were given.

MR. WALPIN: Your Honor, again, *the question is not whether there is alleged mismanagement or waste, but whether there is disclosure.* I point to Your Honor that paragraph 8 in the supplementary proxy material details the intercompany —

* * *

[MR. WALPIN]: That details the way in which the intercompany pricing was done if any additional disclosure above what was in the proxy statement was required. Again, what the plaintiff asks for is discovery of the propriety — and I am quoting from plaintiff's brief. Plaintiff says, "Discovery of the propriety of this matter is imperative." Your Honor, I respectfully submit that it is not the propriety of what is done there, although we have no problem with it, but whether there was disclosure of what is done.

* * *

THE COURT: Yes, Mr. Pattison. * * * I thought you might want to respond to what Mr. Walpin had said.

* * *

[MR. PATTISON]: Now, Your Honor inquired as to three or four of our points that we raised in discovery.

First in the supplementary proxy there was the item that we called 17 million in our brief, actually it is 16 million 8 hundred some odd thousand. We rounded it off.

The point is, we don't know what this money represents. They say it is an account receivable. We don't know whether it was loans made or failure of Basic Four or the other subsidiaries to pay for operations and benefits from Genesis One. We have no idea what it is about, whether it has made any money.

The real thrust of the suit, then, is they failed to disclose that they have taken 16/22nds of the total assets of this company and used it for other benefits and intra-corporate dealings, totally left us with the bulk of our assets in a non-productive status for several years.

* * *

[MR. PATTISON]: Basic Four Corporation, which was one of the other subsidiaries, was making money hand over fist and we don't know whether the bulk of our $16 million was in that corporation or where.

But we say that the Class C shareholders were entitled to some sort of income for the use of their main assets of the corporation on a pro rata share of the profits if those assets were used by other corporations. But we don't know what was done or where it was used until we get discovery.

Also, the projections as to Wordstream Corporation being the only possible source of future income was also erroneous. If we had the $17 million, we could just invest it in something else that would produce income that would

entitle the Class C shareholders to dividend payments, if nothing else from interest.

The point is they have projected a negative picture and painted a false picture of the potential earnings of this company from the way they have stated it. Also when you come down —

THE COURT: I'm not sure I follow that.

MR. PATTISON: They painted a false picture, Your Honor, by saying we have no potential source of income other than a certain line, where in fact they have taken the bulk of our assets and used it for something else.

THE COURT: But that was disclosed.

MR. PATTISON: No sir. They did it belatedly and did it in such a manner that you don't know. [The ordinary investor still cannot discern.]

THE COURT: It was disclosed, although you say belatedly.

MR. PATTISON: Not in a way it was pointed out in what they have done and why it wasn't paying income. You see, the point is they made a projection * * * on future earnings and said there are only two lines of business, one the old and one the new that we don't know when it is going to pay off, yet they have taken our assets —

THE COURT: What you are suggesting is there may have been some mismanagement here, maybe the $17 million should have been used for some other purpose than to — whatever the subsidiary —

MR. PATTISON: Yes, sir, we are.

THE COURT: But that is a different lawsuit than this, isn't it?

MR. PATTISON: No. This Court has diversity jurisdiction and this is a pendant matter and can be brought into the suit as part of the overall suit. The point is they have used the proxy material to hide the waste and mismanagement, and therein lies the fraud, you see.

* * *

[MR. PATTISON]: Also they got another point in there where they talk about the early payment of the $175,000 a month. What they fail to disclose is if they had simply given a pro forma statement of when the payout was actually made, the Class C shares would have been entitled to approximately another $2 a year, because when the payment stops on the so-called financing arrangements, those funds inure back to the payment schedule of dividends.

* * *

[MR. PATTISON]: The statement, "The increase in percentage of cash flow from operations or the elimination of certain fixed charges do not change this fact."

Well, that is patently untrue. The elimination of those fixed charges and of the monthly payments does change the cash flow available to the Class C shareholders substantially.

They are paying out 175 to 200 thousand a month, close to $2 million a year, roughly $2 a share, so that the actual cash flow available for payments would be well in excess of what it was at the time.

* * *

THE COURT: All right. I think what I would like to suggest is this: [addressing Mr. Walpin] * * *

I wonder if you can give me a reply to [plaintiffs' brief]. * * * I am particularly interested in what you have to say about the points that we have discussed this afternoon. So I would hope you could make it short and reasonably prompt.

* * *

[THE COURT]: Mr. Pattison, if after I have seen Mr. Walpin's brief if I feel that I need something further from you, I will let you know. But there has been an awful lot of paper already turned out on this * * *.

[Emphasis supplied]

[993A-1031A]

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PROXY SOLICITATION
dated June 27, 1978

MAI

Chairman of the Board
and President

June 27, 1978

Re: Special Meeting of Shareholders on August 10, 1978

Dear Shareholder:

We are requesting your approval of a proposal to amend the Company's Certificate of Incorporation to permit the current redemption of the Series C Preferred Stock at $10.50 per share. The Certificate currently requires the Preferred to be redeemed in four annual installments of $2.50 per share on December 15, 1981 through 1984.

This proposal is intended to simplify the capital structure of the Company by eliminating a security (issued in 1974 during a period of financial stress) which has caused both investor confusion and operating and accounting segregations which are not justified by normal business considerations.

The $10.50 per share is $2.25 higher than the $8.25 closing bid price for the Series C Preferred on the day before the Board of Directors approved the redemption of the Preferred. This represents a 27% premium over this market price.

The present value of receiving the four annual installments between 1981 and 1984 is $6.99 (as of September 30, 1978, assuming an interest rate of 8% per annum). Thus, the proposed $10.50 per share would represent a 50% premium over the present value of the mandatory redemption price.

The redemption would preclude the holders of the Series C Preferred Stock from the possibility of receiving future contingent dividends to the extent of any Cash Flow From Operations of Genesis One Computer Corporation, the Company's subsidiary. Holders received $.32 per share for fiscal 1976 and $.06 per share for fiscal 1977 and, based on current estimates, would not receive, in any event, a dividend for fiscal 1978.

As indicated in the Proxy Statement, the Company's ability to pay dividends to the Preferred holders in future years will be dependent upon its subsidiary's success in marketing the Wordstream™ word processing system, a computer based, shared logic multi-terminal system. This program represents the entry by MAI into the office systems market, an expansion from the data processing market in which we have been engaged since 1961. As stated in the last Annual Report, the word processing market is large and growing rapidly and we hope to gain an appropriate share. However, the office systems market has already been entered by such major companies as IBM and Xerox, unlike the small business market when we pioneered it with our BASIC/FOUR® system in 1971.

Because of our limited experience to date (the Wordstream system having been acquired last October), any estimate as to the expected success of the Wordstream program is a matter of speculation. The amount of dividends payable during the years 1979 through 1984 arising from Cash Flow

Management Assistance Inc.
300 East 44th Street
New York, NY 10017

From Operations could range from zero to a significant amount, subject to the maximum of $39.60 per share ($40.00 less the $.40 in dividends already paid) permitted under the Certificate of Incorporation.

We believe that a redemption price of $10.50 per share for the Series C Preferred Stock is a fair and reasonable price. We urge that those of you who are Preferred holders consider whether the $10.50 today is preferable to the $10.00 per share in redemption payments beginning in December 1981 and speculating as to what dividends, if any, may be paid in the future.

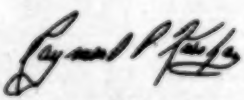
For those of you who own shares of Common Stock, we expect that elimination of the Preferred Stock should result in the benefits to the Company described in the Proxy Statement which will ultimately improve the value of your investment.

Any inquiries can be made in writing to the Shareholders' Relations Department, Management Assistance Inc., at 300 East 44th Street, New York, New York 10017 or by calling, if outside New York State, (800) 221-4562 or, if in New York State, (212) 557-3970 (collect if outside New York City).

We invite you to attend the Special Meeting; however, whether you do or not, and whether you own few or many shares, we urge you to execute your proxy, voting FOR the amendments, and return it promptly in the enclosed envelope.

We believe that the Company's performance during the past five years has been exemplary and expect our growth to continue. We appreciate your past support and welcome it for the future.

Sincerely,



RAYMOND P. KURSHAN

[Here omitting formal "Notice of Special Meeting of Shareholders," 1 page, in usual form.]

PROXY STATEMENT FOR SPECIAL MEETING OF SHAREHOLDERS

This Proxy Statement is furnished by Management Assistance Inc. (the "Company"), a New York corporation, having its principal office at 300 East 44th Street, New York, New York 10017, in connection with the solicitation of proxies for use at a Special Meeting of Shareholders to be held on Thursday, August 10, 1978, or at any adjournment or adjournments thereof. Only shareholders of record at the close of business on Thursday, June 22, 1978 (the "Record Date"), are entitled to vote at the meeting. Proxy material is being mailed on June 28, 1978 to the Company's shareholders of record.

The Company and its subsidiaries are collectively referred to herein as "MAI".

VOTING SECURITIES AND PRINCIPAL HOLDERS

The voting securities at the meeting will consist of 7,690,996 shares of Common Stock, $.40 par value (the "Common Stock"), and 838,361 shares of Class C Preferred Stock, $.20 par value (the "Series C Preferred Stock"). Approval of the amendment of the Company's Certificate of Incorporation requires the approval of a majority of the outstanding shares of Common Stock and the outstanding shares of Series C Preferred Stock, each voting separately as a class. Each shareholder is entitled to cast, in person or by proxy, one vote for each share of Common Stock and one-quarter vote for each share of Series C Preferred Stock held by such shareholder at the close of business on the Record Date.

Shareholders who execute proxies retain the right to revoke them by notifying the Company at any time before they are voted. Unless so revoked, the shares represented by proxies will be voted at the meeting. Proxies solicited by the management of the Company will be voted in accordance with the directions given therein.

The table below sets forth information as of the Record Date with respect to the persons who are known to the Company to be the beneficial owners of more than 5% of the outstanding shares of Series C Preferred Stock and with respect to the shares of Series C Preferred Stock and Common Stock beneficially owned by all directors and executive officers of the Company as a group. The Company does not know of any person who is the beneficial owner of more than 5% of the outstanding shares of Common Stock.

Title of Class	Name and Address of Beneficial Owner	Amount Beneficially Owned	Percent of Class
Series C Preferred Stock	Continental Illinois National Bank and Trust Company of Chicago 231 South LaSalle Street Chicago, Illinois 60693	42,443	5.06%
Series C Preferred Stock	Continental Illinois National Bank and Trust Company of Chicago, not individually but solely as Trustee for various Trusts 231 South La Salle Street Chicago, Illinois 60693	50,622	6.04%
Series C Preferred Stock	All directors and executive officers of the Company as a group	9,103(1)	1.09%
Common Stock	All directors and executive officers of the Company as a group	328,372(1)(2)	4.27%

(1) Includes 40 shares of Series C Preferred Stock and 14,150 shares of Common Stock owned by wives and minor children of the directors and executive officers, as to which shares the directors and officers disclaim any beneficial interest.

(2) Includes 87,500 shares of Common Stock with respect to which directors and executive officers have the right to acquire beneficial ownership upon the exercise of options.

PROPOSED AMENDMENT OF CERTIFICATE OF INCORPORATION

Proposed Change

On April 13, 1978, the Board of Directors of the Company authorized the proposed redemption of the 838,361 outstanding shares of the Series C Preferred Stock at a redemption price of $10.50 per share, subject to the fulfillment of certain conditions. Under the Company's Certificate of Incorporation as presently in effect, the Company is obligated to redeem the Series C Preferred Stock for $10.00 per share in four annual installments of $2.50 per share on December 15, 1981, 1982, 1983 and 1984. For a detailed description of the rights and preferences of the Series C Preferred Stock, see "Existing Rights and Preferences of Series C Preferred Stock". The $10.50 per share redemption price was fixed by the Company (taking into account the market prices, the present value of the mandatory redemption payments and the contingent dividend rights of the Series C Preferred Stock) and was not the subject of arm's length negotiations, nor was there any independent evaluation of such price. Exhibit A to this Proxy Statement sets forth the text of the changes to be made in the Certificate of Incorporation if the proposal is approved.

The redemption is subject to (1) shareholder approval of the amendments to the Company's Certificate of Incorporation set forth herein; (2) approval by the holders of the 6½% Convertible Subordinated Debentures due August 15, 1997 (the "Convertible Debentures") and 6½% Subordinated Capital Debentures due December 31, 1980 (the "Capital Debentures") of the Company (the Convertible Debentures and the Capital Debentures being sometimes collectively referred to as the "Debentures") of certain amendments to the Indentures pursuant to which the Debentures were issued (collectively, the "Indentures"); (3) the Company obtaining acceptable financing for the redemption of the Series C Preferred Stock in the form of a substantially concurrent privately placed debt financing in the approximate amount of $9,000,000 and (4) appropriate consents being obtained under the Financing Agreement dated as of December 10, 1984, as amended (the "Financing Agreement"), between the Company, its subsidiary Genesis One Computer Corporation (the "Subsidiary", the name of which is to be changed to Wordstream Corporation) and Continental Illinois National Bank and Trust Company of Chicago ("Continental"). All conditions to the redemption must be fulfilled prior to May 31, 1979. See "Additional Conditions to the Redemption".

The Series C Preferred Stock is entitled to a contingent dividend in the maximum amount of $40.00 per share (of which $.40 per share in dividends has been paid to date), based primarily upon specified percentages of the Cash Flow From Operations (as defined in Exhibit F to this Proxy Statement) of the Subsidiary. The Board of Directors of the Company believes that the contingent dividend rights of this class of stock, which are based upon future events, interfere with the Company's financial planning and operating decisions and create substantial uncertainty to the Company and the holders of the Series C Preferred Stock. In addition, although the Company has no present intention to list the Common Stock on the New York Stock Exchange, the dividend and voting rights of the holders of the Series C Preferred Stock disqualify the Company's Common Stock from being eligible for listing. See "Reasons for Proposed Redemption".

The redemption would result in the retirement of the entire class of Series C Preferred Stock. There would be no change either in the number or par value of the authorized or issued shares of Common Stock or in any of the relative rights, privileges or preferences thereof, except as noted under "Effect of Redemption on Common Stock".

Summary of Changes If Proposed Redemption Is Approved (See also "Effect of Redemption on Common Stock")

Series C Preferred Stock

Existing rights and preferences (See "Rights and Preferences of Series C Preferred Stock")	Proposed rights and preferences
$10 redemption price (1981-1984)	$10.50 redemption price (1975)
contingent dividends noncumulative dividends certain voting rights certain liquidation rights	as a result of the redemption, the holders of Series C Preferred Stock will have none of these rights

Common Stock

Existing rights and preferences	Proposed rights and preferences
certain voting rights	all voting power of the Company
certain liquidation rights	all liquidation rights of shareholders
certain dividend and distribution rights	all dividend and distribution rights of shareholders

Existing Rights and Preferences of Series C Preferred Stock

The holders of Series C Preferred Stock are entitled to the following rights and preferences under the Company's Certificate of Incorporation as presently in effect:

Redemption Price **— A redemption price of $10.00 per share which is payable in four annual installments of $2.50 per share on December 15, 1981, 1982, 1983 and 1984.**

Cash Flow Dividends — Dividends based on 25% of Cash Flow From Operations (as defined in Exhibit F to this Proxy Statement) of the Subsidiary until the final redemption of the Series C Preferred Stock. Such dividends are payable annually on December 15 to shareholders of record as of December 1 only if and to the extent that the Subsidiary had Cash Flow From Operations during the preceding fiscal year. After the indebtedness under the Financing Agreement and the Amended and Restated Purchase Agreements dated as of May 31, 1974 (the "Purchase Agreements"), between the Company, the Subsidiary and the persons named in Schedule A thereto, has been paid, such percentage will be increased to 75% and, in addition, 50% of the net proceeds received by the Company from any secondary offering of equity securities or subordinated indebtedness of a domestic subsidiary will be set aside for payment of a dividend on the ensuing December 15. (The indebtedness under the Financing Agreement will be paid in full no later than May 10, 1979 and the indebtedness under the Purchase Agreements no later than July 10, 1980.) No dividend will be payable, whether based on Cash Flow From Operations of the Subsidiary, a secondary offering of securities or otherwise, if the aggregate amount of dividends theretofore paid (on a cumulative basis) equals $40.00 per share.

Additional Dividends **— A noncumulative dividend, when and as declared by the Board of Directors of the Company, of $.01 per share per annum before any dividend may be paid on the Common Stock. (Such dividends are currently prohibited by the Purchase Agreements and the Indentures.)**

Voting Rights **— The right to one-quarter vote for each share held, voting with the holders of the Common Stock and not as a separate class, with respect to the election of directors and the approval of employee benefit plans and the selection of independent certified public accountants.**

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In addition, the holders of Series C Preferred Stock have the right to vote as a separate class (1) on any proposal to merge or consolidate the Subsidiary or to sell or otherwise dispose of substantially all of its assets, (2) on any proposal to declare or pay any dividends upon any junior stock or make any other distribution on any junior stock at any time if there is a default in making redemption payments or if the net income of MAI after September 30, 1970 does not exceed the amount of all dividends and distributions made after that date on, and the amount expended by MAI after said date for the acquisition of, any shares of junior stock and (3) upon all other matters on which shareholders have the right to vote. Also, if on December 31 of any year a default exists in the redemption of the Series C Preferred Stock, the holders of Series C Preferred Stock, voting separately as a class, are entitled at all elections of directors to elect the smallest number of directors which would constitute a majority of the authorized number of directors (in addition to their right to vote with other shareholders for the election of directors) until such subsequent December 31 as all defaults with respect to such redemption payments are cured.

Liquidation Value — A liquidation value (applicable only upon dissolution of the Company) of $50.00 per share, less the cumulative amount of any dividend and partial redemption payments theretofore made.

Reasons for Proposed Redemption

There has been a substantial change in the operations of the Subsidiary and in the Subsidiary's relative significance to the profit and loss results of MAI since the issuance of the Series C Preferred Stock in August 1974. The Subsidiary contributed 26% of MAI's revenue and 63% of its income before income taxes and extraordinary items for the year ended September 30, 1974. The relative significance of the Subsidiary has been reduced in each subsequent year as revenue and income from MAI's BASIC/FOUR® system (a computer line designed to perform accounting, record-keeping and other business functions for small and medium-sized businesses and for decentralized operations of large businesses) have increased. For the year ended September 30, 1977, the Subsidiary contributed 14% of MAI's revenue and 14% of its income before income taxes and extraordinary items. Notwithstanding this relative decline in importance, an expansion of the Subsidiary's businesses has resulted in the Subsidiary's revenue and income before income taxes and extraordinary items being higher in dollar amount in fiscal 1977 than in fiscal 1974.

In 1974, the Subsidiary's only business was the sale and rental of unit record equipment manufactured by International Business Machines Corporation ("IBM") (substantially all of which was acquired prior to 1968) and tape and disc drives (acquired prior to 1971). Revenue from the marketing of this equipment has declined since fiscal 1967 and is expected to continue to decline. To offset such declining revenue, the Subsidiary sought during fiscal 1974 to obtain the right to market other peripheral equipment for various manufacturers on an agency basis, which efforts did not significantly contribute to revenue or income. In fiscal 1975, the Subsidiary began marketing the G77™ information display terminal and the G-Series printers. However, IBM price and product announcements in May 1977 adversely affected the Subsidiary's profit margins and deliveries of IBM's new products in quantity would adversely affect the continued viability of these MAI products. During the current fiscal year, the Subsidiary began marketing the Wordstream™ word processing system. Management believes that the Wordstream system represents a significant area of growth potential. For a more detailed description of these businesses, see "Description of the Subsidiary's Business".

In 1974, MAI did not manufacture any products for marketing by the Subsidiary. In 1976, another subsidiary of the Company, Wordstream Products Corporation ("WPC"), acquired the right to manufacture the G-Series products then being marketed by the Subsidiary. In 1977, WPC acquired the rights to the Wordstream product which the Subsidiary is marketing. Under the terms of the Financing Agreement, all equipment (except the BASIC/FOUR product line) which MAI markets in the United States must be marketed by the Subsidiary, and the Subsidiary is prohibited from

engaging in manufacturing or activities other than marketing. Because Cash Flow From Operations of the Subsidiary (which forms the primary basis for dividends on the Series C Preferred Stock) is determined by the cash flow derived, in part, from marketing the G-Series and Wordstream products, but not the cash flow derived from the manufacturing of these products by WPC, it is necessary to make operating and accounting segregations between the domestic marketing and manufacturing aspects of this line of MAI's business which would not otherwise be made. This segregation has created the necessity for additional detailed accounting records, and has led to organizational and operating inefficiencies. In the opinion of management this segregation is not justified by normal business considerations. In addition, these increasing complexities have coincided with the decline in the relative significance of the Subsidiary to the overall business of MAI. The necessity of this intra-corporate structure results in the diversion of management time and attention from significant business concerns to organizational and operational details.

Even if the Series C Preferred Stock is redeemed as proposed herein, the need to segregate the marketing and manufacturing operations related to the products marketed by the Subsidiary would continue in order to permit the computation of flexible prepayments under the Financing Agreement and Purchase Agreements. However, it should be noted that the indebtedness under the Financing Agreement and Purchase Agreements is prepayable at the option of the Company without premium. Moreover, as of June 10, 1978, the indebtedness under the Financing Agreement had been reduced to $1,758,136 and will be paid in full no later than May 10, 1979, and the indebtedness under the Purchase Agreements had been reduced to $3,171,779 and will be paid in full no later than July 10, 1980.

The Company's financial planning is also hampered by its inability to predict the amount of future dividends which it may be required to pay on the Series C Preferred Stock. Similarly, the holders of the Series C Preferred Stock are not able to anticipate the amount of dividends, if any, which will be paid on their shares prior to their final redemption on December 15, 1994. Under the Certificate of Incorporation, such dividends could amount to $39.60 per share (a maximum of $40.00 per share less the $.40 per share in dividends heretofore paid). From the viewpoint of the holders of the Series C Preferred Stock, the proposed redemption provides immediate cash in a definite amount, which is $2.25 per share higher than the closing bid price for the Series C Preferred Stock in the over-the-counter market on the day prior to the date of the announcement by the Company of the proposed redemption and which represents a 27% premium over such market price.

A dividend of $.08 per share was paid with respect to fiscal 1977 to the holders of the Series C Preferred Stock, as compared with a dividend of $.32 per share with respect to fiscal 1976. The lower dividend was due to the fact that, as a result of the lower selling prices for the G-Series products and the continued decline in revenue from unit record equipment, the Subsidiary's income for the last half of fiscal 1977 was reduced, which adversely affected the Subsidiary's Cash Flow From Operations. Management believes that as a result of these adverse trends, as well as the substantial start up expenditures for the marketing of the Wordstream word processing system, it is unlikely that any dividend would be payable for fiscal 1978.

The Company is unable to predict future dividends beyond fiscal 1978 with any degree of certainty because of the many different factors which are likely to affect the major areas of the Subsidiary's business. As already noted, the decline in revenues from unit record equipment is anticipated to continue and the long range prospects of the G-Series product line have been adversely impacted by IBM's actions. Accordingly, the possibility of any significant future dividends on the Series C Preferred Stock after fiscal 1978 is, in the opinion of management, dependent on the success of the Wordstream word processing system or any other new unrelated products marketed by the Subsidiary (none of which is presently contemplated). In view of the potential market for word processing equipment and the Company's confidence in the Wordstream system, management believes that the Wordstream program will be successful.

Industry surveys indicate that the word processing market is growing rapidly. The installed value of word processing shipments through 1978 is estimated to be $600 million, and is expected

to increase to $1.5 billion by 1981. Furthermore, the Wordstream display terminal type of system is in what is expected to be the faster growing segment of this market. However, the Wordstream system competes with word processing equipment produced by IBM, Xerox, Burroughs (Redactron), Digital Equipment, Wang, Raytheon (Lexitron) and many other manufacturers, some of which have substantially greater financial resources than MAI. Such equipment ranges from memory or self-correcting typewriters to other large computer-based systems. A number of new systems have recently been introduced by other manufacturers, and competition is expected to increase in the future. In addition, new technological advances are likely to be introduced.

Management of the Company is of the opinion that for the Wordstream product line to be a success, the following conditions must be met: (1) the product must operate in a manner acceptable to potential users; (2) WPC, the subsidiary of the Company which manufactures the system, must demonstrate its ability to produce units in significant numbers to meet any growing customer demands, to furnish spare parts on a prompt basis and in suitable amounts to meet appropriate maintenance repair requirements and to satisfy additional equipment (*i.e.*, add-on) requirements of existing customers; (3) the marketing personnel of the Subsidiary must obtain orders at a satisfactory rate and cover major potential markets in the United States; (4) satisfactory maintenance and related services must be furnished by Sorbus Inc. ("Sorbus"), the domestic maintenance service subsidiary of the Company, on a basis profitable to Sorbus and at rates which permit the rental and maintenance charges of the Subsidiary to a customer to be competitive with those of competitors to the Wordstream system; (5) although management believes that the Wordstream system is based on the latest technology, WPC must be able in future years to offer similar or better technological changes than those which competitors will offer; and (6) acceptable financing must be available to MAI, particularly if competitive conditions require a significant number of leases for initial terms which do not result in a full recovery of costs. As of the date of this Proxy Statement, management of the Company believes that only the first condition has been met and, accordingly, the possibility of the Subsidiary generating significant revenue and income from this new product line (and thereby generating Cash Flow From Operations) is dependent on future actions of the Subsidiary and its affiliates and, because of the limited experience to date, cannot be projected on the basis of a record of past performance.

The Wordstream system was acquired through a purchase effected in October 1977 (see Note 11 to Financial Statements in Exhibit D hereto), at which time production was at the rate of two systems per month. In April 1978, the manufacturing operations were moved from Denville, New Jersey to the WPC plant in Houston, Texas and production is now at the rate of approximately five systems per month (currently contemplated to increase to approximately 20 by September 1978). To meet possible future order requirements for the Wordstream system, WPC is currently negotiating with its landlord to have substantial additional plant facilities constructed by the spring of 1979.

The marketing program for the Wordstream system is in its early stage of development. At the time of the acquisition, marketing efforts were limited to the New York metropolitan area. Between December 1977 and May 1978, the Subsidiary opened offices to market the Wordstream system in seven cities in the United States. Of the 29 sales personnel marketing the Wordstream system as of May 1, 1978, only three (all in the New York metropolitan area) had been marketing such equipment for more than three months. MAI believes, based on its experience with respect to the BASIC/FOUR product line, that at least several months are required before sales personnel become productive, if at all. This is likely to be particularly true with a new market, with a new product and in new geographic areas. MAI anticipates commencing international marketing efforts for the Wordstream system in the fall of 1978; however, any international marketing income will not result in Cash Flow From Operations to the Subsidiary for purposes of dividends on the Series C Preferred Stock because the Subsidiary markets only domestically. The Subsidiary has agreed in principle with a non-affiliated leasing company for the latter to purchase Wordstream systems subject to leases entered into by the Subsidiary, with the terms of the agreement currently being finalized. In addition, the Company is in the process of establishing an unconsolidated captive leasing subsidiary to act as a purchaser of Wordstream systems. However, there is no assurance that the agreement with the non-affiliated company, if consummated, or any financing arrangements made by the captive leasing company will be adequate to sustain a lease program.

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Notwithstanding the uncertainties described above with respect to the Wordstream system, the Company obviously undertook this project on the assumption that it would be financially successful. Because MAI is entering a market (word processing) in which MAI has no prior experience and a segment thereof (shared logic) which is relatively new to the industry, its decision to undertake this project and its marketing and production decisions with respect to the Wordstream system have been made primarily on the basis of MAI's own experience with the BASIC/FOUR system and the experience of other companies which market and/or manufacture products competitive with the Wordstream system. Although MAI's experience to date is limited and the results fragmentary, the Wordstream program has generally met management's initial goals in manufacturing and marketing; however, no assurance can be given that future operations will meet management's goals.

To the extent of the success of the Wordstream program through fiscal 1984, the Subsidiary may have Cash Flow From Operations and the redemption of the Series C Preferred Stock would foreclose those shares from any participation therein. The dividends on the Series C Preferred Stock, which are based primarily upon Cash Flow From Operations, could amount to a maximum of $39.60 per share under the Company's Certificate of Incorporation.

In the opinion of the Board of Directors of the Company, the Series C Preferred Stock, because of its unusual and complex dividend, redemption, liquidation and voting rights, results in substantial investor confusion. Redemption of the Series C Preferred Stock will reduce such confusion, will to some extent simplify the Company's financial statements, and may also facilitate the Company's ability to obtain financing. In addition, although the Company has no present intention to list the Common Stock on the New York Stock Exchange, the dividend and voting rights of the Series C Preferred Stock disqualify the Company's Common Stock from being eligible for listing.

The differential between the $10.50 redemption price and the present value (approximately $6.99 as of September 30, 1978, assuming an interest rate of 8% per annum) of the right to receive the $10.00 mandatory redemption price in four equal payments in the years 1981 through 1984 is the consideration being offered by the Company to the holders of the Series C Preferred Stock for their relinquishment of rights to contingent dividends based upon future events, as well as the voting and liquidation rights of this class of stock. Although no independent appraisal has been obtained with respect thereto, the Board of Directors of the Company believes that a redemption price of $10.50 per share for the Series C Preferred Stock is a fair and reasonable price.

Description of the Subsidiary's Business

The Subsidiary is currently engaged in the marketing of three types of products: (i) unit record equipment; (ii) G-Series terminals and printers; and (iii) the Wordstream word processing system.

The Subsidiary's primary emphasis with regard to the unit record equipment has been to keep equipment currently on rent subject to lease and to sell equipment in inventory or which comes off rent. Occasionally the Subsidiary has sold equipment on lease. Rentals from unit record equipment began to decline in fiscal 1967 and continue to decline. The Subsidiary's profit margin with respect to sales of unit record equipment has been adversely impacted because of the declining market for this type of equipment and the necessity (particularly in fiscal 1978) for the Subsidiary to purchase additional units of equipment, usually from equipment brokers, in order to complete equipment packages for prospective purchasers. As a result of this declining profit margin, as well as the increasing costs to maintain the aging equipment which require increasing maintenance charges to purchasers, management of the Company has concluded that continuance of a program to seek purchasers for unit record equipment is not justified and, accordingly, the Subsidiary intends to eliminate by October 1, 1978 the sales force for this type of equipment. Existing sales orders will be filled and equipment not used for this purpose will thereafter be scrapped or used for spare parts. Efforts will continue to be made, however, to keep equipment on rent to current users. In fiscal 1976, the unit record equipment aspect of the Subsidiary's operations generated approximately $2,495,000 in sales revenue and approximately $9,348,000 in rental revenue, compared with approximately $2,596,000 in sales revenue and approximately $7,791,000 in rental revenue in fiscal 1977 and approximately $764,000 in sales revenue and approximately $3,603,000 in rental revenue in the first six months of fiscal 1978.

The G-Series printer and the G77 terminal are fully compatible and interchangeable with the IBM 3277 terminal and the related IBM printers. These products are primarily leased to end-users, with almost all of the equipment subject to lease being sold by the Subsidiary to a non-affiliated leasing company. In May 1977, IBM announced substantial price reductions for its 3277 terminal and related printers and announced new models which may supersede the 3277 terminal and related printers and, therefore, the G77 terminal and G-Series printers. Since IBM made these announcements, the Subsidiary has reduced its prices on these products by up to 25%. After a decline in sales for the third quarter of fiscal 1977, the rate of sales of terminals and printers, as well as new orders, has been higher than the rate of sales and orders in the first half of fiscal 1977, although at a reduced profit margin. Sales of the G-Series products in the United States were not significant in fiscal 1975, amounted to $7,929,000 in fiscal 1976, $11,698,000 in fiscal 1977 and $7,809,000 in the first six months of fiscal 1978.

The third and newest phase of the Subsidiary's operations is the Wordstream display word processing system. The Wordstream system was acquired by the Company in October 1977 and is a computer-based, shared logic multi-terminal word processing system. This system consists of a central processing unit, up to 12 operator work stations and up to three printers for clustered or remote installation. Copy is created on a video display terminal as it would appear on a standard 8½" x 11" page. Text is stored on lightweight, mailable diskettes, commonly called "floppy" disks, each approximately six inches in diameter and capable of holding 330,000 characters or 77 full pages of text. Special features of the Wordstream system include spelling and addition verification and wide column printing. Although it is the opinion of management of the Company that the Wordstream system represents the Subsidiary's area of growth potential, the Subsidiary has been marketing the Wordstream system for less than one year. (See "Reasons for Proposed Redemption" for a description of the current status of manufacturing and marketing efforts with respect to the Wordstream system.

Effect of Redemption on Common Stock

In the event that the Series C Preferred Stock is redeemed, the holders of the Common Stock would have all of the voting power of the Company. At the present time, the holders of the Series C Preferred Stock have the right to vote, together with the holders of the Common Stock and not as a separate class, with respect to the election of directors and the approval of employee benefit plans and the selection of independent certified public accountants and, both under the Company's Certificate of Incorporation (see "Existing Rights and Preferences of Series C Preferred Stock") and under New York law, have the right to vote as a separate class on certain matters. As of the Record Date, the holders of the Series C Preferred Stock had, in the aggregate, 2.65% of the total voting power of the Company on all matters where the Preferred votes as a single class with the Common Stock. (See "Existing Rights and Preferences of Series C Preferred Stock.")

After the redemption of the Series C Preferred Stock, the holders of the Common Stock would share, pro rata, in any dividends or distributions which may, from time to time, be declared by the Board of Directors of the Company and in any distributions in liquidation. In fiscal 1976 and 1977, a dividend of 8.32 and 8.08 per share, respectively, was paid to the holders of the Series C Preferred Stock; no dividend was paid in fiscal 1975. The Company has never paid a cash dividend on the Common Stock. Under the Certificate of Incorporation as presently in effect, the holders of the Series C Preferred Stock have certain preferences on liquidation and with respect to dividends and distributions. See "Existing Rights and Preferences of Series C Preferred Stock". It should be noted, however, that certain dividend restrictions and other restrictions on stock transactions would continue to exist under the Financing Agreement, the Purchase Agreements and the Indentures and are anticipated to be imposed under the prospective indebtedness to finance the redemption of the Series C Preferred Stock.

If the proposed amendments to the Indentures are approved by the Company's Debentureholders, the Company may pay dividends on its capital stock and make certain other restricted payments out of 30% of MAI's Net Income Available for Common Stock (as defined in the Indentures) accumulated after September 30, 1977. Under the Financing Agreement, the Company may pay dividends and

make certain other restricted payments out of 50% of Consolidated Net Income (as defined in the Financing Agreement, which definition is similar to the test under the Indentures) accumulated after September 30, 1976. Under the Purchase Agreements, the Company may not pay cash dividends (other than payments required on the Series C Preferred Stock). As discussed under "Reasons for Proposed Redemption", the indebtedness under the Purchase Agreements is prepayable at the option of the Company without premium and will be paid in full no later than July 10, 1980. Under the terms (which are still being negotiated) of the indebtedness to finance the redemption price for the Series C Preferred Stock, the Company would be limited in the amount of dividends and certain other restricted payments to 35% of Consolidated Net Income (which definition is anticipated to be similar to the test under the Indentures) accumulated after September 30, 1977.

All of the other rights and privileges of the holders of the Common Stock will be unchanged by the redemption of the Series C Preferred Stock.

Additional Conditions to the Redemption

The proposed redemption of the Series C Preferred Stock requires certain amendments to the Indentures. The Company has requested that the Debentureholders consent to amendments to the Indentures which would (1) permit the Company to retire shares of its capital stock out of the net proceeds from a substantially concurrent sale of debt securities (such as the debt placement contemplated in connection with the proposed redemption), which right would supplement the current right to use the proceeds from a substantially concurrent sale of equity securities; (2) permit the Company to pay dividends or make distributions on, or retire or otherwise acquire, shares of its capital stock out of 50% of the Net Income Available for Common Stock accumulated after September 30, 1977 (currently 100% of the Net Income Available for Common Stock accumulated after September 30, 1965 under the Indenture relating to the Capital Debentures and September 30, 1966 under the Indenture relating to the Convertible Debentures); and (3) permit the Company to make payments required by law in satisfaction of appraisal rights of its shareholders. Conditioned upon the redemption of the Series C Preferred Stock, the Company has agreed to increase the interest rate on the Debentures from 6½% to 7½% per annum. The proposed amendments to the Indentures are substantially broader than those which would be required merely to permit the proposed redemption of the Series C Preferred Stock. These amendments require the consent of the holders of at least 66⅔% of the outstanding principal amount of each of the Capital Debentures and the Convertible Debentures. Although the Company is currently soliciting the Debentureholders for their consents, such consents have not yet been obtained. If the redemption has not been completed prior to May 31, 1979, the amendments to the Indentures will not become effective.

At the time the Board approved the redemption of the Series C Preferred Stock, it determined that it would be in the best interests of the Company to finance the approximately $9,000,000 redemption price by means of a substantially concurrent private placement of debt. Although certain terms of the indebtedness are still being negotiated, the Company has obtained commitments in principle from Continental, Bankers Trust Company and Industrial Valley Bank for an aggregate $9,000,000 seven-year loan with interest at the rate of 108% of Continental's prime rate of interest in effect from time to time, with an average maximum rate not to exceed 9.45%. The principal would be repayable in 24 equal quarterly installments commencing in the second year. The Company would be required to pay a commitment fee of ½ of 1% per annum and MAI would be required to maintain compensating balances with the banks equal to 10% of the average outstanding balance of the loan. The Company would have the right to prepay the loan in whole or in part at any time without penalty. Pursuant to the terms of the loan agreement, MAI would be limited in incurring future indebtedness and in making investments (including acquisitions) in accordance with specified ratio tests and would be required to meet certain net worth, working capital and balance sheet ratio tests. In addition, the Company would be limited in the amount of cash dividends, subordinated debt redemptions and acquisitions of its own capital stock to 35% of Consolidated Net Income accumulated after September 30, 1977. Pursuant to the Trust Indenture Act of 1939, Bankers Trust Company would be required to resign as Trustee of the Indenture with respect to the Convertible Debentures

and a Successor Trustee would have to be designated. James G. Hellmuth, a director of the Company, is a Vice President of the parent of Bankers Trust Company.

Capitalization

Set forth below is the capitalization of MAI as of May 31, 1978 and as adjusted on a pro forma basis to reflect as of such date the effect of consummation of the proposed redemption of the Series C Preferred Stock and the additional conditions to such redemption:

	May 31, 1978	Pro forma May 31, 1978
Long term debt (including current portion of $3,308,877; pro forma $3,308,877):		
Financing Agreement Note due 1979(1)	$ 1,931,136	$ 1,931,136
Mortgage payable due 1993(2)	4,050,000	4,050,000
Due for purchase of business(3)	3,239,720	3,239,720
New Subordinated Notes due 1980(1)	3,196,779	3,196,779
New bank term loan due 1985(4)	—	9,000,000
6½% Convertible Subordinated Debentures due 1987 (pro forma 7½%)(5)	5,987,500	5,987,500
6½% Subordinated Capital Debentures due 1980 (pro forma 7½%)(5)	1,774,500	1,774,500
Other (6)	649,745	649,745
Total Long-Term Debt	20,829,380	29,829,380
Shareholders' Equity:		
Capital Stock:		
Series C Preferred Stock, $.20 par value, authorized 900,967 shares; issued 838,361 shares; stated at $10 per share redemption value ($41,582,705 liquidating value) (7)	8,383,610	—
Common Stock, $.40 par value; authorized 10,000,000 shares; issued 7,686,951 shares(8)	3,074,781	3,074,781
Additional paid-in capital(9)	68,013,206	67,244,025
Accumulated deficit(10)	(28,490,615)	(28,490,615)
Unamortized cost of restricted stock grants	(886,275)	(886,275)
Total Shareholders' Equity	50,094,707	40,941,916
Total Capitalization	$70,924,087	$70,771,296

(1) See notes 4 and 5 to Financial Statements.

(2) See note 10 to Financial Statements.

(3) See note 11 to Financial Statements.

(4) See ADDITIONAL CONDITIONS TO REDEMPTION.

(5) The Convertible Subordinated Debentures are convertible into Common Stock at $52 per share, subject to anti-dilution provisions. See note 5 to Financial Statements.

(6) See note 4 to Financial Statements.

(7) See EXISTING RIGHTS AND PREFERENCES OF SERIES C PREFERRED STOCK and note 6 to Financial Statements.

(8) There are 115,144 shares of Common Stock reserved for the conversion of the Convertible Subordinated Debentures, 354,551 shares of Common Stock reserved for the exercise of employee stock options and 229,588 shares of Common Stock reserved for issuance in connection with the Company's restricted stock plan. See notes 6, 7 and 9 to Financial Statements.

(9) On a pro forma basis, the difference of $419,181 between the $10.50 per share redemption price and the $10.00 per share stated value of the Series C Preferred Stock and estimated expenses of the redemption of $350,000 have been charged to Additional paid-in capital.

(10) Accumulated deficit is as of March 31, 1978.

The historical ratio of MAI's earnings to fixed charges for the years ended September 30, 1976 and 1977 was 9.2 and 11.0, respectively, and for the six months ended March 31, 1977 and 1978 was 9.9 and 12.2, respectively. For the purpose of computing the ratio of earnings to fixed charges, earnings represent income before income taxes and extraordinary items plus fixed charges. Fixed charges represent interest expense, amortization of deferred finance cost and 33⅓% of rental expense. The pro forma ratio of MAI's earnings to fixed charges for the year ended September 30, 1977 and for the six months ended March 31, 1978 would have been 7.7 and 9.1, respectively. For the purpose of determining the pro forma ratio, fixed charges were adjusted to give effect to interest requirements for the indebtedness to be incurred to finance the proposed redemption of the Series C Preferred Stock (with interest at 9.18% per annum based on 108% of Continental's prime rate of 8.5% at June 15, 1978) and the increase in the rate of interest on the Debentures from 6½% to 7½% per annum.

Dissenters' Rights of Appraisal

The following is a summary of applicable appraisal rights which is not intended to be a complete statement of the relevant New York law in this area and is qualified in its entirety by reference to Section 623 of the Business Corporation Law of the State of New York (the "BCL") set forth in full in Exhibit B hereto.

Any holder of shares of Series C Preferred Stock objecting to the proposed amendment of the Company's Certificate of Incorporation and claiming, contrary to the opinion of the Board of Directors of the Company, that the $10.50 per share is not the fair value of such shares, may obtain payment in cash for such amount as is ultimately (perhaps judicially) determined to be the fair value of his or her shares by complying with the requirements of Section 623 of the BCL. (The holders of shares of Common Stock will not have such right.) A dissenting holder must file with the Company, before the taking of the vote thereon, a written objection to the amendment, including a statement of intention to demand payment for his or her shares if the amendment is effected, and must not vote in favor of the amendment. Within 20 days after the Company gives notice of the shareholders' vote authorizing the amendment, such dissenting holder must file with the Company a written notice of his or her election to dissent from the amendment stating his or her name and residence address, the number of shares of stock as to which he or she dissents and a demand for payment of the fair value of such shares.

Upon the filing of an election to dissent and demand for payment, a holder loses all rights with respect to his or her shares, except to be paid the fair value thereof. Although the notice of election may be withdrawn at any time before an offer is made by the Company to purchase his or her shares, thereafter it may be withdrawn only with the Company's consent.

A holder may not dissent as to less than all of his or her shares of the Series C Preferred Stock. A negative vote on the amendment does not constitute the written objection required to be filed by a dissenting holder in order to receive payment in cash for his or her shares.

Within one month after filing the notice of election to dissent, the holder must submit the certificates representing his or her shares of the Series C Preferred Stock to the Company or its transfer agent for notation thereon of the election to dissent, after which such certificates will be returned to the holder. Failure to so submit the certificates may result in the loss of dissenter's rights. The Company must make a written offer to each holder who has filed such notice of election to pay for his or her shares at a specified price which the Company considers to be their fair value. If the Company and the dissenting holder are unable to agree as to such value, Section 623 provides for judicial determination of the fair value of the shares as of the close of business on the day prior

to the date of the shareholders' meeting, which value is determined by excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal.

Section 623 is a complex statutory provision and the courts have strictly enforced its detailed procedural requirements.

As indicated under "Additional Conditions to the Redemption", one of the amendments being sought to the Indentures is to permit payment of appraisal rights without restriction. The Financing Agreement has already been amended to permit the Company to make such payments. To the extent holders of the Series C Preferred Stock exercise rights of appraisal, the Company may only make such payments with the proceeds of a substantially concurrent equity or subordinated debt financing under the provisions of the Purchase Agreements.

Tax Consequences

Counsel for the Company, Rosenman Colin Freund Lewis & Cohen, has advised the Company that, in its opinion, the redemption of the Series C Preferred Stock will be treated, for Federal income tax purposes, as an exchange rather than a dividend distribution and that receipt by a shareholder of cash in payment for redeemed shares will give rise to capital gain or loss (such gain or loss to be considered long-term if the shareholder held the shares for more than 12 months and short-term if the shareholder held the shares for 12 months or less) equal to the difference between the cash received and the tax basis of the redeemed shares in the hands of the shareholder, and that there will be no other adverse Federal income tax consequences arising from the redemption. One-half of long-term capital gains constitutes a tax preference which, for certain persons, will be subject to the 15% minimum tax and cause a reduction in the benefits of the maximum tax on personal service income. Holders of shares of the Series C Preferred Stock should also note that the redemption of their shares may have state and local tax consequences.

Because of these variations, each holder should consult with his or her own tax advisors with respect to such consequences.

Procedural Aspects

If the proposal is adopted by the required vote of the holders of a majority of all the outstanding shares of Common Stock and a majority of all the outstanding shares of Series C Preferred Stock, each class voting separately, and if the other conditions have been fulfilled (see "Additional Conditions to the Redemption"), the Company will file with the Department of State of the State of New York a Certificate of Amendment setting forth the changes to be made in its Certificate of Incorporation. Exhibit A to this Proxy Statement sets forth the text of the changes to be made in the Certificate of Incorporation if the proposal is approved.

If the proposed change to the Certificate of Incorporation becomes effective and the other conditions to the redemption have been satisfied, a Notice of Redemption will be mailed, not less than 10 nor more than 30 days prior to the redemption date set by the Board of Directors of the Company, to each holder of record of shares of Series C Preferred Stock at his or her address as it appears in the records of the Company. It is the Company's current intention to send such Notice of Redemption as soon as possible after all conditions precedent have been met.

As required by the Certificate of Incorporation, all shares of Series C Preferred Stock redeemed by the Company will be cancelled and may not be reissued.

The proposed amendment to the Certificate of Incorporation, if approved by the shareholders at the Special Meeting, will also authorize the Company to file a further amendment to the Certificate of Incorporation, following the redemption of the Series C Preferred Stock, to eliminate the 62,606 shares of authorized but unissued Series C Preferred Stock and to eliminate all other references to the Series C Preferred Stock.

Market Prices of Series C Preferred Stock

The Series C Preferred Stock is traded over-the-counter. The high bid and low asked prices of the Series C Preferred Stock, as reported by the National Quotation Bureau, Inc., have been as follows during the two fiscal years ended September 30, 1977 and during fiscal 1978 through the date indicated:

	First Quarter		Second Quarter		Third Quarter		Fourth Quarter	
	High	Low	High	Low	High	Low	High	Low
1976	$2.50	1.63	4.75	2.75	4.88	3.75	4.13	3.88
1977	$5.13	3.88	6.25	5.25	6.50	5.88	8.13	6.00
1978	$5.63	7.50	9.13	7.63	9.50*	8.25*		

* Through June 16, 1978

The foregoing quotations do not include retail markups, markdowns or commissions and do not represent actual transactions. On April 12, 1978, the day before the announcement of the proposed redemption of the Series C Preferred Stock, the representative closing bid and asked prices of the Series C Preferred Stock, as reported by the National Association of Securities Dealers Automated Quotation System, were $8.25 and $8.63, respectively. On June 22, 1978, representative closing bid and asked prices were $9.38 and $9.75, respectively.

Recommendation

THE BOARD OF DIRECTORS RECOMMENDS THAT SHAREHOLDERS VOTE FOR THE PROPOSAL TO AMEND THE CERTIFICATE OF INCORPORATION TO PERMIT THE COMPANY TO REDEEM THE 58,361 OUTSTANDING SHARES OF ITS SERIES C PREFERRED STOCK IN THE MANNER SET FORTH IN THIS PROXY STATEMENT.

FINANCIAL STATEMENTS

The consolidated and parent company financial statements of the Company listed in the index on page 23 are included, together with the report on page 22 of Peat, Marwick, Mitchell & Co., independent certified public accountants, as Exhibits C and D attached hereto. Management's discussion and analysis of certain of the consolidated statements of operations is also included in Exhibit C. In addition, certain interim unaudited financial data of MAI is included in Exhibit E attached hereto.

INDEPENDENT PUBLIC ACCOUNTANTS

The Board of Directors and shareholders have heretofore renewed the Company's arrangements for the engagement of Peat, Marwick, Mitchell & Co., independent certified public accountants, of New York, New York as auditors for the fiscal year ending September 30, 1978. A representative of Peat, Marwick, Mitchell & Co. will be present at the meeting. The Company has been informed that the representative does not intend to make any statement to the shareholders at the meeting, but will be available to respond to appropriate questions from shareholders.

The Audit Committee of the Board of Directors consists of Gerald Rosenberg, Luther A. Schwalm, Gerald E. Veltmann (Chairman) and Aaron Wildavsky.

COST OF SOLICITATION

The expenses in connection with the solicitation of proxies, including the cost of preparing, assembling and mailing this Proxy Statement and the related material, will be borne by the Company. The Company has retained Georgeson & Co., 100 Wall Street, New York, New York 10005, to assist with the solicitation of proxies from the Company's shareholders, for which services Georgeson & Co. will receive a fee which, together with out-of-pocket expenses, is expected to aggregate approximately $10,000. In addition, the Company will pay brokers and other custodians, nominees and fiduciaries their reasonable expenses for sending proxy material to principals and obtaining their proxies. In addition to solicitation by mail, proxies may be solicited personally or by telephone or telegraph by directors, officers and regular employees of MAI who will receive no additional compensation therefor. The Company may also use temporary personnel including former employees and relatives of current and former employees to assist in the solicitation effort, for which services they may be paid on an hourly basis.

MANAGEMENT ASSISTANCE INC.

ROBERT W. BEREND,
Secretary

Dated: New York, New York
June 27, 1978

[Here omitting exhibits totalling 48 pages.]

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PROXY SOLICITATION
dated August 5, 1978

MAI

Chairman of the Board
and President

August 5, 1978

Re: Special Meeting of Shareholders on August 10, 1978

Dear Shareholder:

On June 27, 1978, the Company mailed to you Proxy Material with respect to a Special Meeting of Shareholders scheduled for August 10, 1978. The purpose of the meeting is to consider and act upon a proposal to amend the Company's Certificate of Incorporation to permit the current redemption of the Series C Preferred Stock at $10.50 per share.

On August 2, 1978, a holder of 273 shares of Series C Preferred Stock commenced an action on behalf of himself and all other persons similarly situated as a class in the United States District Court for the Southern District of New York which, among other things, seeks to enjoin the holding of the Special Meeting and requests damages for alleged violations of various provisions of the Federal securities laws and various state common law doctrines. In his complaint, plaintiff alleges that the Company's Proxy Statement is one "which gives less than full and fair disclosure of relevant facts, which omits material facts, which is false and misleading, and which contains material misrepresentations."

The Company believes that this action is totally without merit, and the Company intends to contest this action vigorously.

At the time of the mailing of the Proxy Material, the Company believed that the Proxy Statement made full and fair disclosure of all relevant facts and did not contain any statement which, in the light of the circumstances under which it was made, was false or misleading with respect to any material fact, or omitted to state any material fact necessary in order to make the statements therein not false or misleading.

After a careful examination of the plaintiff's complaint, the Company remains of the same opinion. The Company believes that the Proxy Material complies with the rules and regulations of the Securities and Exchange Commission with respect to the solicitation of proxies. The Company is, however, sending you this letter consistent with the Company's policy of keeping its shareholders fully informed.

The Company believes that the "facts" allegedly omitted or misrepresented in the Proxy Statement (1) are not material or relevant to the shareholders' consideration of the issues presented, (2) are adequately set forth in the Proxy Statement, (3) consist of subjective opinions or conclusory statements, without factual basis, which are thus inappropriate for inclusion in the Proxy Statement, (4) are totally untrue or (5) would be misleading for a full and fair analysis of the matters presented in the Proxy Statement. The Company does not believe that it is necessary to repeat the facts which

Management Assistance Inc.
300 East 44th Street
New York, NY 10017

specifically appear in the Proxy Statement. The Company will not set forth in this letter the "facts" which consist of subjective opinions or conclusory statements, which are untrue or which would be misleading for a full and fair analysis of the matters presented in the Proxy Statement. The Company is willing to disclose in this letter the balance of the "facts" which the plaintiff claims were omitted or misrepresented in the Proxy Statement, even though the Company does not believe they are material or relevant to the shareholders' consideration of the issues presented.

1. Set forth below is information as of June 22, 1978 (the "Record Date") with respect to the shares of Series C Preferred Stock and Common Stock beneficially owned by each member of the Board of Directors and with respect to the outstanding options to acquire shares of Common Stock held by each member (similar information is contained each year in the Company's proxy statement for its Annual Meeting of Shareholders):

	Shares Beneficially Owned as of the Record Date				Options Outstanding as of the Record Date to Acquire Common Stock
Name	Common Stock	% of Class	Series C Preferred Stock	% of Class	
Raymond P. Kurshan	68,349*	0.9%	1,030	0.1%	21,875
Robert W. Berend	21,974	0.3%	29	NIL	12,500
James G. Hellmuth	0	0	0	0	0
Arthur J. Lasse	500	NIL	0	0	0
Gerald Rosenberg	500*	NIL	40*	0	0
Luther A. Schwalm	1,463*	NIL	134	NIL	0
Charles F. Trayes	1,025	NIL	100	NIL	0
Gerald E. Vehmann	550*	NIL	0	0	0
Aaron Wildavsky	100	NIL	0	0	0

* Includes shares owned by wives or minor children as to which beneficial ownership is disclaimed by the respective director.

Of the foregoing directors, only Messrs. Kurshan and Berend are employees of the Company.

As of the Record Date, all executive officers of the Company as a group (other than Messrs. Kurshan and Berend) and their wives or minor children owned 146,411 shares of Common Stock (1.9% of the class) and 7,800 shares of Series C Preferred Stock (0.9% of the class) and held options to acquire 53,125 shares of Common Stock.

2. Genesis One Computer Corporation (the "Subsidiary", the name of which is to be changed to Wordstream Corporation) has spent approximately $324,000 in fiscal 1977 and $1,309,000 during the nine-month period ended June 30, 1978 in connection with the starting up and the marketing of a word processing system, including the Wordstream™ system. The Subsidiary expended no material amounts in fiscal 1976 or 1977 for developing other new businesses. No costs related to the acquisition of the manufacturer of the G-Series products in February 1976 or to the acquisition of the manufacturer of the Wordstream system in October 1977 were paid by or charged to the Subsidiary. The Company and its other subsidiaries, including its manufacturing subsidiary Wordstream Products Corporation ("WPC"), expended substantial sums for developing new businesses (including the aforementioned acquisitions), but such expenditures did not affect the Subsidiary's "Cash Flow From Operations" (as defined in the Certificate of Incorporation, a copy of which definition is in Exhibit F to the Proxy Statement), and thus did not reduce the amount of dividends paid on the Series C Preferred Stock.

3. As set forth in the Proxy Statement, upon payment in full of the indebtedness under the Financing Agreement dated as of December 10, 1964, as amended (the "Financing Agreement"), between the Company, the Subsidiary and Continental Illinois National Bank and Trust Company of Chicago and under the Amended and Restated Purchase Agreements dated as of May 31, 1974 (the "Purchase Agreements"), between the Company, the Subsidiary and the persons named in Schedule A thereto, the percentage of Cash Flow From Operations of the Subsidiary which is required to be paid as dividends on the Series C Preferred Stock will increase from 25% to 75%. In addition, upon payment in full of this indebtedness the fixed prepayments relating thereto aggregating $200,000 per month will of course no longer be a deduction from Cash Flow from Operations. Although this indebtedness is scheduled to be paid in full no later than July 10, 1980, the Cash Flow From Operations subsequent to the payment of this indebtedness will depend upon the revenue and expenses of the Subsidiary at that time. As is stated in the Proxy Statement, "the possibility of any significant future dividends on the Series C Preferred Stock after fiscal 1978 is, in the opinion of management, dependent on the success of the Wordstream word processing system or any other new unrelated products marketed by the Subsidiary (none of which is presently contemplated)." The increase in the percentage of Cash Flow From Operations or the elimination of certain fixed charges do not change this fact. If the Wordstream program is not successful (and no other new unrelated products are successfully marketed), the Company does not believe there will be any significant future dividends based on Cash Flow From Operations. If the Wordstream program is successful (or other new unrelated products are successfully marketed), the Company believes there may be such dividends in amounts directly related to the extent of such success.

4. The Subsidiary's revenue from the rental of unit record equipment in each of its last three fiscal years has declined by more than 15% from the prior fiscal year. As stated in the Proxy Statement, such revenue "is expected to continue to decline".

5. At the present time, the Subsidiary is not engaged in any program to develop terminals or printers which will be compatible and interchangeable with the new lower priced models now being delivered by International Business Machines Corporation ("IBM") to supersede the IBM 3277 terminal and related printers (whose prices themselves were significantly reduced a year ago). Although WPC has investigated the manufacture of new competitive terminals and printers, the IBM prices for its new products would not, under current conditions, permit WPC or the Subsidiary to generate a large enough profit margin to warrant the development costs. Accordingly, both WPC and the Subsidiary have determined to concentrate their efforts on the Wordstream program. As stated in the Proxy Statement, "management believes that the Wordstream system represents a significant area of growth potential." Because of the IBM price and product announcements, management no longer believes that the G-Series products represent such growth potential.

6. Although, as noted above, in the opinion of management, the future dividends on the Series C Preferred Stock are dependent on the future success of the Wordstream system, the Company is willing to disclose information with respect to the financial condition and results of operations of the Subsidiary for the three years and nine months ended June 30, 1978. The Company purchased the company which manufactured and distributed the Wordstream system in October 1977. The Subsidiary's marketing efforts for the Wordstream systems began shortly thereafter.

Set forth below is a table showing the calculation of "Cash Flow From Operations" of the Subsidiary as defined in Exhibit F to the Proxy Statement for the three years ended September 30, 1977 and the nine-month periods ended June 30, 1977 and 1978:

Genesis One Computer Corporation

Cash Flow From Operations

	Year ended September 30,			Nine months ended June 30,	
	1975	1976	1977	1977	1978
Net income (loss)	$ 168,803	$3,178,291	$2,650,997	$2,650,383	$ (335,906)
Add:					
All non-cash items deducted in calculating net income or loss:					
Amortization of deferred finance costs	12,336	12,336	12,050	9,232	4,014
Depreciation and amortization	2,077,420	62,130	163,229	111,308	197,393
Write-off of settlement agreement receivable	1,025,100	—	—	—	—
Cash proceeds from the sale of equipment not reflected in the calculation of net income	43,220	—	—	—	—
	3,326,909	3,252,687	2,826,176	2,770,943	(334,497)
Less:					
Payments of principal	2,400,000	2,400,000	2,400,000	1,800,000	1,800,000
Capital expenditures	65,045	103,337	184,320	106,822	229,341
	2,465,045	2,503,337	2,584,320	1,906,822	2,029,341
Cash Flow From Operations	$ 861,324*	$ 749,330*	$ 241,856	$ 864,121	$(2,364,038)

* In fiscal 1976 the cash flow of Genesis One Leasing Corporation ("GOLC"), a wholly owned subsidiary of the Company, amounting to $339,593 was combined with the Cash Flow From Operations of the Subsidiary of $749,330 to arrive at a combined cash flow of $1,088,923 on which basis the dividend on the Series C Preferred Stock was calculated for that year. In fiscal 1975, GOLC had a negative cash flow from operations of $63,701 and such negative amount was not combined with the Subsidiary's Cash Flow From Operations for the purpose of making flexible prepayments under the agreements mentioned in item 3 above. Pursuant to the Certificate of Incorporation of the Company, no dividends on the Series C Preferred Stock were payable with respect to the Cash Flow From Operations of the Subsidiary for fiscal 1975.

Set forth below is information with respect to the revenue and gross profit before selling and other expenses for the Subsidiary's unit record equipment, G-Series products and Wordstream systems for the three fiscal years ended September 30, 1977 and the nine-month periods ended June 30, 1977 and 1978:

	Year Ended September 30,			Nine Months Ended June 30,	
	1975*	1976	1977	1977	1978
Revenue					
Unit Record Equipment	$14,441,518	$11,902,699	$10,470,474	$7,864,123	$ 6,404,774
G-Series Products	1,247,274	7,999,623	11,833,209	8,668,459	12,329,811
Wordstream System	—	—	—	—	737,793
Gross profit before selling and other expenses					
Unit Record Equipment	6,031,771	6,956,414	6,337,304	4,849,623	3,871,350
G-Series Products	260,671	2,601,259	3,549,432	3,113,212	2,331,477
Wordstream System	—	—	—	—	298,985

* During fiscal 1975, GOLC had revenues from marketing other products of $152,285 and a gross profit thereon of $33,386.

Gross profit is determined before the deduction of marketing commissions and other selling expenses, general and administration expenses and certain other expenses. The revenue and gross profit amount

included in the above table for fiscal 1975 and 1976 has been prepared on a pro forma basis to reflect the operations of GOLC, which then had marketing rights to the G-Series and other products. The operations of GOLC were transferred to the Subsidiary as of the end of fiscal 1976.

Set forth below is the unaudited summary of operations of the Subsidiary for the three years ended September 30, 1977:

GENESIS ONE COMPUTER CORPORATION

UNAUDITED SUMMARY OF OPERATIONS(1)(2)

	Year Ended September 30,		
	1975	1976	1977
Revenue:			
Equipment rentals	$10,905,200	$ 9,374,329	$ 7,975,920
Product sales	3,530,549	2,528,170	14,327,763
Miscellaneous	334,455	1,937,607	—
	$14,790,073	$13,840,106	$22,303,683
Costs and expenses:			
Direct costs:			
Direct costs of rentals, product sales and services	5,805,134	4,940,285	12,347,308
Depreciation of equipment held for rent	2,004,913	—	69,539
Selling, general and administrative expenses	5,636,439	4,980,586	6,150,350
Interest, including amortization of deferred financing costs, net	1,165,348	921,323	643,499
Parent Company charges, net	734,876	389,422	791,196
	14,760,910	11,443,616	20,002,112
Income from operations before interest waived by lenders, income taxes and extraordinary item	29,163	2,396,490	2,301,571
Interest included in costs and expenses above which has been waived by lenders	1,164,830	701,711	804,139
Income from operations before income taxes and extraordinary item	1,193,993	3,188,201	2,885,697
Provision for income taxes	577,000	1,534,000	1,434,000
Income before extraordinary items	616,993	1,654,201	1,451,697
Extraordinary items:			
Loss carryforward tax credits	85,000	1,534,000	1,299,000
Write-off of settlement agreement receivable, net of income tax benefit	(533,100)	—	—
	(448,100)	1,534,000	1,299,000
Net income	$ 168,893	$ 3,178,201	$ 2,650,897

(1) The above is unaudited, consistent with the Company's policy not to request its auditors to render an opinion with respect to the financial statements of domestic subsidiaries.

(2) The unaudited summary of operations gives effect to all adjustments (none of which were other than normal recurring accruals) necessary, in the opinion of management of the Company, to present fairly the results of operations.

Set forth below is a condensed unaudited summary of the Subsidiary's revenue and expenses for the nine-month periods ended June 30, 1977 and 1978:

GENESIS ONE COMPUTER CORPORATION
CONDENSED UNAUDITED SUMMARY OF OPERATIONS†

	Nine Months Ended June 30,	
	1977	1978
Revenue	$16,532,362	$19,672,380
Costs and expenses	14,281,553	20,988,743
Income (loss) from operations before interest waived by lenders, income taxes and extraordinary item	2,251,000	(1,316,363)
Interest included in costs and expenses which has been waived by lenders	404,374	248,457
Income (loss) from operations before income taxes and extraordinary item	2,655,383	(1,067,906)
Provision for (recovery of) income taxes	1,299,000	(512,000)
Income (loss) before extraordinary item	1,356,383	(555,906)
Extraordinary item — loss carryforward tax credits	1,294,000	—
Net income (loss)	$ 2,650,383	$ (555,906)

† The unaudited summary of operations gives effect to all adjustments (none of which were other than normal recurring accruals) necessary, in the opinion of management of the Company, to present fairly the results of operations.

Set forth below is the condensed unaudited balance sheet of the Subsidiary as of September 30, 1977:

GENESIS ONE COMPUTER CORPORATION
CONDENSED UNAUDITED BALANCE SHEET*
September 30, 1977

ASSETS	
Cash	$ 239,805
Receivables (less allowance for doubtful accounts)	2,908,503
Inventories	1,485,158
Due from affiliated companies	16,803,781
Furniture, fixtures, and equipment, at cost (less accumulated depreciation)	490,338
Other assets	327,877
	$22,382,662
LIABILITIES AND SHAREHOLDERS' EQUITY	
Accounts payable	$ 73,277
Accrued expenses	1,193,577
Current installments of long-term and subordinated debt	2,400,000
Due to affiliated companies	1,172,980
Long-term debt, secured by equipment held for rental	1,231,136
Subordinated debt	3,096,779
Total liabilities	$ 9,167,749
Shareholders' equity:	
Capital stock	$ 5,002,800
Paid-in capital	67,000,900
Accumulated deficit	(58,908,587)
Total shareholders' equity	$13,094,913
	$22,382,662

* See footnote (1) on page 5.

7. As set forth in the Proxy Statement, subsequent to the payment in full of the indebtedness under the Financing Agreement and Purchase Agreements (scheduled for no later than July 10, 1980), the holders of the Series C Preferred Stock are entitled to 50% of the net proceeds received by the Company from any secondary offering of equity securities of a domestic subsidiary or subordinated indebtedness of a domestic subsidiary. The Company is not required to make, nor has it made any representation that it would make, any efforts in this connection, and has no present plans to effect any such offering. Management does not believe that any such offering is in the Company's interest.

8. The Subsidiary markets the G-Series and Wordstream products manufactured by WPC. The intercompany sales price of the G-Series products is based on the same price list as existed during fiscal 1975 when the Subsidiary purchased certain of the G-Series products from the previous manufacturer (since acquired by the Company). Pending further experience, the intercompany sales price of Wordstream products has to date been based on a 100% mark-up of burdened cost of WPC, which price is currently under review. The Company, which is a holding company providing management and support services to its subsidiaries, charges each of its subsidiaries an annual management fee in proportion to its revenue contribution. Each subsidiary is also charged for accounting and legal expenses incurred for its direct account.

In order to give our shareholders adequate time to consider the information contained in this letter, the Company has determined that the polls at the Special Meeting shall remain open until 11 A.M. on August 18, 1978. Accordingly, any shareholder whose new or changed proxy is received prior to that time will have that vote counted.

MANAGEMENT CONTINUES TO RECOMMEND THAT SHAREHOLDERS VOTE FOR THE PROPOSAL TO AMEND THE CERTIFICATE OF INCORPORATION TO PERMIT THE COMPANY TO REDEEM THE OUTSTANDING SHARES OF ITS SERIES C PREFERRED STOCK IN THE MANNER SET FORTH IN THE PROXY STATEMENT.

IF YOU HAVE ALREADY VOTED AND DO NOT WISH TO CHANGE YOUR VOTE, NO ACTION IS REQUIRED. IN CASE YOU HAVE NOT ALREADY VOTED, OR WISH TO CHANGE YOUR VOTE, PLEASE SIGN, DATE AND MAIL THE BLUE (COMMON) AND/OR GREEN (PREFERRED) PROXY CARDS TODAY IN THE ACCOMPANYING SELF-ADDRESSED ENVELOPE, WHICH REQUIRES NO POSTAGE IF MAILED IN THE UNITED STATES.

Any inquiries can be made in writing to the Shareholders' Relations Department, Management Assistance Inc., at 300 East 44th Street, New York, New York 10017 or by calling, if outside New York State, (800) 221-4362 or, if in New York State, (212) 557-3070 (collect if outside New York City). Any shareholder who wishes to obtain an additional copy of the Proxy Material mailed on June 27, 1978 may also call or write the Shareholders' Relations Department.

Sincerely,

RAYMOND P. KURSHAN

[349A-355A]

[EXCERPTS FROM] BRIEF OF DEFENDANTS [2d CIRCUIT]

[Same case and numbering as before;
filed Oct. 19, 1981]

Counterstatement of the Case

* * *

The crux of plaintiff's claim was that the $10.50 redemption price was less than the fair value of the C Stock, and that the Proxy Statement omitted material facts and contained misleading statements in violation of the Securities Exchange Act of 1934 §§14(a) and 10(b), 15 U.S.C. §§78n(a) and 78f(b), and the Rules promulgated thereunder. Plaintiff also asserted claims of common law fraud and conversion based on pendent jurisdiction.

While confident that the Proxy Statement contained no misstatement or omission of material facts, MAI mailed to all shareholders (345a) a Supplementary Proxy Statement, dated August 5, 1978 ("Supplementary Proxy Statement") (118a), advising of plaintiff's lawsuit, and containing virtually all of the facts which, while not material, plaintiff claimed had been omitted, except for those matters which would have been affirmatively misleading. Although the Special Meeting of Shareholders, at which the redemption proposal was considered, was held on August 10, 1978 (as called for by the Proxy Statement), MAI kept the polls open until 11:00 a.m. on August 18, 1978 (270a), and the Supplementary Proxy Statement expressly advised the shareholders of their right to change their proxies until that time (124a).

Simultaneously with the service of his complaint, plaintiff moved for an order preliminarily enjoining defendants

from voting the proxies which had been received in response to the Proxy Statement. Holding that plaintiff had failed to demonstrate either a likelihood of success on the merits (especially in view of the mailing of the Supplementary Proxy Statement) or the possibility of irreparable injury, the District Court denied plaintiff's motion from the bench on August 7, 1978 (115a-116a), and later confirmed that denial by Memorandum Decision dated August 10, 1978 (130a).[3]

* * *

The deposition of plaintiff (as well as the production by plaintiff of all documents which he claimed formed the basis of his allegations in the complaint) was taken on October 16 and 17, 1978 (543a). Plaintiff never took any discovery in this action. Indeed, with the one exception noted below, plaintiff never even expressed the desire for any discovery until after defendants had moved for summary judgment well over a year after the commencement

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[3]On August 15, 1978, plaintiff filed a notice of appeal to this Court from the District Court's denial of his motion for a preliminary injunction, and, despite the fact that such notice of appeal divested the District Court of jurisdiction over that matter, plaintiff simultaneously filed a motion for reargument in the District Court (134a), thereby necessitating a response by defendants (143a). The District Court did not address plaintiff's motion.

On August 17, 1978, Judge Ellsworth A. VanGraafeiland of this Court denied plaintiff's "motion for urgency ruling," made that day, to postpone the adjourned date of the MAI shareholders meeting (339a). Following this denial of his motion for a stay, plaintiff withdrew his appeal from the District Court's denial of his motion for a preliminary injunction and plaintiff also withdrew his motion to this Court for an injunction pending appeal (338a).

of the action.[4]

By Order dated June 12, 1979, and filed June 15, 1979 (237a), the District Court granted defendants' cross-motion to expand the plaintiff class.[5] Notice of the class action was then sent to all members of the class (241a).

On December 12, 1979 — more than 16 months after the commencement of the action and six months after the

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[4]Plaintiff's refusal to appear at his deposition pursuant to notice necessitated a motion by defendants to compel his attendance (145a). That motion was granted, and plaintiff's motion for a protective order (167a) and his request for a concurrent deposition of defendant Raymond P. Kurshan were denied by Magistrate Kent Sinclair on September 13, 1978. By Memorandum filed October 10, 1978 (205a), the Magistrate denied plaintiff's renewed application for a concurrent deposition of Mr. Kurshan (196a). The Magistrate ruled that Mr. Kurshan's deposition should be deferred "for a short period" since, as plaintiff conceded, it was not required in connection with plaintiff's imminent motion for class certification (206a). The Magistrate also noted that "(d)efendants have **not** opposed producing Mr. Kurshan with reasonable dispatch" (**Id.**; see also 202a-204a) (emphasis in original). Plaintiff never sought thereafter to depose Mr. Kurshan (or anyone else). Indeed, the only discovery plaintiff ever initiated was the service of a Notice to Produce (documents) on March 27, 1981 (965a) — **after** defendants' motion for summary judgment had been submitted to the District Court. Because virtually all of the 70 items contained in that request were objectionable (on grounds of relevance, privilege, vagueness, burden, etc.), defendants interposed appropriate objections on April 29, 1980 (998a). Plaintiff never challenged any of those objections.

[5]Defendants' cross-motion to expand the plaintiff class (213a) was made necessary by the inexplicable refusal of plaintiff's attorney to execute a proffered stipulation setting forth the agreement of counsel (reached in November 1978) that the class be expanded (to include all persons who owned C Stock on June 22, 1978, the Record Date for the Special Meeting of Shareholders at which the redemption of all the C shares was approved, except those shareholders who were directors or executive officers of MAI on that date), and that the action then be certified as a class action (340a-343a). By Report and Recommendation filed January 31, 1979 (228a), Magistrate Sinclair recommended that defendants' cross-motion be granted in virtually all respects. We understand that the reason why the District Court did not enter its Order affirming the Magistrate's Report until June 1979 was due to an error in the Clerk's office.

District Court's certification of the action as a class action — defendants moved for summary judgment dismissing the complaint (266a). Defendants also sought attorneys' fees on the ground that the action was wholly without merit, was instituted without legal or factual basis and was maintained in bad faith for vexatious and oppressive purposes. Defendants' motion was supported by the affidavits of Robert W. Berend, Esq., of MAI, and Gerald Walpin, Esq., attorney for defendants, together with exhibits annexed thereto (268a-542a)[6] and the deposition of plaintiff (543a-934a).

Plaintiff's opposing papers consisted entirely of two memoranda of law, a belated 9(g) statement and conclusory attorney's affidavits in support of applications for an adjournment and to defer summary judgment pending discovery (947a, 950a, 962a). Plaintiff filed no affidavits or exhibits in opposition to the summary judgment motion on the merits.[7]

After hearing oral argument (991a) on defendants' summary judgment motion and plaintiff's cross-motion to

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[6]Defendants subsequently filed the affidavit of Alvin Weston, an employee of the Bank of New York, which was (and is) MAI's transfer agent (345a).

[7]After seeking and receiving from the District Court three adjournments (totalling more than two months) for time to file opposing papers, plaintiff finally served on February 24, 1980, a "partially complete brief" in opposition to defendants' motion. Plaintiff did not file any affidavits, or even a Rule 9(g) statement, at that time. Thereafter, after defendants had filed their reply papers on the motion and in direct contravention of the District Court's denial of his application for yet another adjournment, plaintiff served a "Combined Substitute and Supplemental Brief In Opposition to Motion for Summary Judgment", a Rule 9(g) statement and a cross-motion to "defer summary judgment proceedings pending discovery" (961a). Despite its initial refusal to accept plaintiff's late papers (957a), the District Court later read and considered them (1104a).

defer, and after requesting (1030a) and receiving an additional submission by defendants (1032a) with respect to plaintiff's alleged need for discovery, the District Court granted defendants' summary judgment motion and dismissed the complaint (and denied plaintiff's cross-motion to defer) by Memorandum Decision dated May 4, 1981 (1101a) and Judgment filed May 18, 1981 (1122a). First, the Court contrasted defendants' "extensive affidavits and exhibits asserting factual data" with the total absence of "affidavits as to factual matters" in plaintiff's opposing papers, mentioning plaintiff's utter failure to provide the Court "with any basis" for concluding that discovery would reveal factual information relevant to oppose defendants' motion (1104a), Next, the Court noted that plaintiff's deposition was "replete with concessions by plaintiff that he had no factual basis to support particular charges, including the fraud allegation, in the complaint" (*Id.*). Then, the Court found that the Supplementary Proxy Statement was issued in "a proper manner" (1106a), that the "absence of court approval [was] immaterial" (*Id.*), and that resolicitation of proxies was not required especially since *"there were no deliberate nor material omissions from the initial proxy"* (1107a) (emphasis added).

The District Court then conducted a thorough and painstaking paragraph-by-paragraph review of the complaint, and concluded not only that all of plaintiff's claims lacked any merit, but that many of them were admittedly based on nothing more than sheer speculation and were therefore "frivolous" (see, *e.g.*, 1106a, 1109a, 1111a, 1113a, 1114a, Memorandum Decision ftn. 6).[5] Accordingly, the

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* * * *

District Court dismissed the complaint.

However, despite finding that plaintiff's claims were variously baseless, speculative and frivolous, the District Court denied defendants' application for attorneys' fees because "[t]he filing of the lawsuit brought about the supplemental proxy statement which, although perhaps unnecessary, did provide additional information" (1114a). The Court did not discuss any of the undisputed facts put forward by defendants on the motion demonstrating that (a) the action was commenced for the purpose of eliciting an extortionate settlement (see 321a-323a, 334a-337a)[9] and (b) even after the issuance of the Supplementary Proxy Statement, plaintiff continued to prosecute the action in bad faith, and persistently made groundless motions and engaged in other obstructionist tactics (see 323a-326a).

Following the entry of summary judgment, plaintiff moved (1116a) for post-judgment relief seeking: (1) amendment of the summary judgment to provide for an award of attorneys' fees to plaintiff in the amount of $100,000 for the "benefits" allegedly conferred on the plaintiff class and MAI from plaintiff's having brought, prosecuted and lost the action;[10] (2) a voluntary dismissal of plaintiff's state law claims without prejudice to their renewal in state court; (3) the setting aside of the summary

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[9]Plaintiff offered not to file the action if MAI would enter into a settlement with him, and, immediately after the denial of his motion for a preliminary injunction, plaintiff offered to settle the action (without notice to the class) for, among other things, a payment of $400,000 for "attorneys' fees" (see p. 42, infra).

[10]According to plaintiff, those benefits were in "compelling" the issuance of the Supplementary Proxy Statement (which the District Court had found to be unnecessary) and in obtaining for MAI "the res judicata effect of class certification" which "protected its assets from repetitive litigation" (1116a).

judgment and the granting of plaintiff's previously-denied application for discovery prior to a decision on the summary judgment motion; and (4) reargument of the summary judgment motion.

The District Court found that plaintiff's motion was "frivolous and wholly without merit," and, accordingly, denied the motion in all respects and ordered that "defendants are awarded attorneys' fees incurred by them in opposing this motion" (1124a-1125a). After defendants detailed by affidavits (1128a, 1139a) the expenses actually incurred ($9,519) in opposing the motion, the District Court awarded them $6,000 in attorneys' fees (1150a-1153a).

HOWARD D. PATTISON
ATTORNEY AT LAW

AREA CODE 214
823-8400

July 19, 1978

Mr. Robert W. Berend, Esq.
General Counsel
Management Assistance, Inc.
300 East 44th Street
New York, New York 10017

Re: Charles Ben Howell v. Management Assistance, Inc. et al

Dear Sir:

This is to advise you that in collaboration with Mr. Charles Ben Howell of this city, I am preparing a suit to enjoin the voting of proxies at the proposed special meeting of shareholders scheduled for August 10, 1978. Our preliminary investigation indicates that the proxy statement solicited with reference thereto is inadequate, misleading, and possibly fraudulent.

We expect to have our lawsuit prepared for filing within one week. However, before doing so, we feel that the possibilities of settlement should be explored in order to protect the company from adverse publicity. Please contact me if you desire to engage in settlement negotiations prior to the filing of this lawsuit.

Yours very truly,

Howard D. Pattison

HDP:ah

PA 64

HOWARD D. PATTISON
ATTORNEY AT LAW
105 S. PRAIRIEVILLE ST
ATHENS, TEXAS 75751
214-675-6010

September 1 , 1978

Mr. Gerald Walpin
Attorney at Law
575 Madison Avenue
New York, New York 10022

Re: Charles Ben Howell, etc. et al.
VS Management Assistance, Inc.
et al.

Dear Mr. Walpin:

I appreciated the opportunity of visiting with you on the telephone on Wednesday, October 9. I am happy to respond to your suggestion that I submit my thoughts concerning the possible settlement of this case to you by letter.

We have analyzed the material contained in Mr. Berend's affidavit and exhibits thereto. Based on the information now available, I believe that live and let live settlement of the case would call for the company to pay the $10.50 already promised and to further enhance its offer by issuing one common share for each "C" share outstanding. The company should further assume direct liability for attorneys' fees and suit expenses in the amount of 50¢ per share based on 838,361 "C" shares outstanding.

Mechanically speaking, the quickest and simplest method of settling the case would be to ask the Court's permission to nonsuit the case for the purpose of settlement. If approved by the Court, this method would obliviate the necessity of notice to the class, would eliminate the necessity of long evidentiary hearings and would reduce the contingency of intervention by other "C" shareholders bent on forcing the settlement terms up to unreasonable levels.

The disadvantage to the company would be that an out of court settlement would not be res judicata as against the class. It would remain exposed to proxy statement liability suits, either as class actions or individual actions until limitations runs. To my way of thinking, the exposure is not as serious as it may appear on the surface because it is entitled to credit in subsequent suits for everything paid in settlement of the present suit, except for the 50¢ in fees.

However, perhaps I am disgressing from my point. I believe that the company should have the choice as to the form in which the settlement is cast. We would naturally prefer the short and quick route, but the choice is yours, not ours.

This letter is to be construed as a discussion, not a commitment. There are too many variables outstanding at this time to make concrete propositions. Among other matters, I remain to be convinced that MAI can sustain the current market price of its common shares. The company neither has a pre-eminent market position nor an extended history of stable profitability. I view the stock as having an established market value of no more than six times its most recent twelve months earnings of about $2. However, I am disgressing again. The message that I wish to impart is that if the company wishes to settle for cash, my concept of a proper settlement range would be considerably below the current market price of one share of common stock. When the money is distributed, any "C" shareholder who is optimistic about Wordstream and Basic Four can place a limit order with his own broker at his own price.

Neither have I discarded my basic beliefs concerning the underlying value of the "C" shares. To the contrary, the disclosures made since the filing of the lawsuit have reinforced them. Our projections, based on a 15 percent rate of decline for non-proprietary lease equipment, based on the continued but declining profitable sale of G-Series equipment for 3-5 years, and based on minimum profitability for Wordstream commensurate with the investment made and committed thereto; indicates a minimum payout on the "C" shares through the cut-off date in the range of $30-50 per share. However I am a realist. I know that it is not possible to settle suits for top dollar. The facts of life are that the company has maximum exposure of $50 plus punitive damages and attorney fees. A defendant will universally choose to litigate unless a settlement is proposed for less than the defendant's total exposure.

I am also aware that stockholder litigation always involves a tremendous economic disparity. In the world of here and now, David does not always slay Goliath.

I am aware of the tremendous delays of the law. In the TWA case, if my memory serves correctly, the Supreme Court entered a take nothing wiping out of a $450 million verdict something like nine years after suit was brought. In the Telex case, the appellate courts wiped out six years of litigation and a $220 million judgment.

I am also aware that in a case such as this, most of the evidence lays in the enemy camp. Tedious time-consuming discovery is required in order to build a case. As the discovery unfolds, I reserve the right to raise or lower my thinking as to settlement value. Whatever the defendants might have desired to hide, they have had several years headway and much expert assistance in doing so. The more the defendant fights to withhold his records, the more certain the plaintiff becomes that he is on the right trail.

As far as the attorneys' fee claim is concerned, we are negotiable as to the amount. We are not negotiable as to the principle that the defendant is directly liable for fees and expenses. The most cursory comparison between the original proxy statement and the supplement discloses that all the meaningful figures are in the supplement. You have also put into the record the fact that a demand

for supplementation of the proxy statement was made before suit was brought. The company's refusal of the demand is proved by its failure to honor the demand during the 21 day interim until suit was brought whereas as soon as suit was filed, the supplement was sent out in three days' time. Under the Supreme Court's Auto-Lite decision, we, the attorneys for the plaintiffs have already rendered a valuable service to the plaintiff class by obtaining this information for them and defendants are liable for our fees.

When I say that we are negotiable as to the amount of attorney's fees, it goes without saying that the earlier you engage in meaningful settlement discussions, the more negotiable that we will be on the fee question. We would further emphasize that this is contingent fee litigation. Historically, the major factor in measuring contingent fees is the value of the benefit conferred. The federal courts have numerously held that those who undertake the gamble of working for months and years for nothing (as in TWA and Telex) must be compensated sufficiently to interest qualified attorneys in taking the case. Mr. Abe Pomerantz was recently interviewed on the TV program, "Wall Street Week," and the panel spent most of its time criticizing the attorney fees he has won. He contended that in spite of the fact that his personal risks are far greater than those of the defense attorneys, he has, to the extent of his knowledge, never received more than the opposing defense lawyers, and in many instances, he has received little or nothing because the outcome of the suit was, from the plaintiff's point of view, a disappointment.

I will welcome your comments at an early date.

Very truly yours,

HOWARD D. PATTISON

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cc: file
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No. 82-136

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IN THE

Supreme Court of the United States

October Term, 1982

CHARLES BEN HOWELL, Suing on Behalf of Himself and All Other Persons Similarly Situated as a Class,

Petitioner,

against

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN and CHARLES F. TRAYES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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No. 82-138

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES BEN HOWELL, Suing on Behalf of Himself and All Other Persons Similarly Situated as a Class,

Petitioner,

against

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Preliminary Statement

Respondents Management Assistance Inc., Genesis One Computer Corporation, Robert W. Berend, Raymond P. Kurshan and Charles F. Trayes ("Respondents") respectfully request that this Court deny the petition of Charles Ben Howell ("Petitioner") for a writ of certiorari, seeking

review of the Judgment of the United States Court of Appeals for the Second Circuit in this case. That Judgment and the Second Circuit's unreported Statement in support thereof, both dated January 7, 1982, and the Second Circuit's Order, dated February 24, 1982, denying Petitioner's subsequent motion for a rehearing, are reproduced at pages 19, 1-4 and 20 of Petitioner's Appendix, respectively.[1]

The Second Circuit's Judgment affirmed (a) a Memorandum Decision dated May 4, 1981 (PA4-17) and a Judgment entered thereon on May 18, 1981 (PA20), by the United States District Court for the Southern District of New York (Stewart, J.), granting Respondents' motion for summary judgment and dismissing Petitioner's complaint, and (b) a Memorandum Decision dated June 11, 1981 (PA 17-19) and a Judgment entered thereon on July 29, 1981 (PA21), by the same District Court, denying Petitioner's motion for reargument and various other forms of post-judgment relief, and granting to Respondents the attorneys' fees incurred by them in opposing Petitioner's said motion.[2]

Counterstatement of the Case

Petitioner's statement of the case, and indeed his entire Petition, is replete with misstatements of fact, distortions of the record and gratuitous attacks upon the personal integrity of Respondents, their attorneys and the Courts below—

1. Hereinafter, we adopt the citation form set forth at page 1, note 1 of the Petition.

2. Contrary to Petitioner's statement (Petition pp. 1-2), the District Court's Memorandum Decisions are officially reported at 519 F. Supp. 83.

all of which are totally baseless.[3] As virtually all of those misstatements, distortions and attacks are irrelevant to the merits of Respondents' successful motion for summary judgment, they do not merit a response. Rather, we shall limit this response to relevant matters. However, our failure to respond to particular matters contained in the Petition should not be construed as agreement with Petitioner's description of those matters.

Petitioner has reproduced in his Appendix (at PA56-62) all but two paragraphs of the Counterstatement of the Case which was contained in Respondents' Brief to the Second Circuit. Rather than repeat it herein, we reproduce below the two paragraphs thereof omitted from Petitioner's Appendix, and we respectfully refer this Court to that complete Counterstatement as an accurate description of the relevant proceedings below:

> "Plaintiff, an owner of 275 shares of Class C Preferred Stock, $.20 par value ('C Stock'), of defendant Management Assistance Inc. ('MAI') (footnote omitted), commenced this class action on August 1, 1978, to enjoin defendants from voting proxies, obtained by a proxy statement mailed to all shareholders on June 28, 1978 ('Proxy Statement') (32a), in connection with MAI's proposed redemption of C Stock. The complaint (6a) also sought injunctive relief against the

3. Typical of Petitioner's baseless, irresponsible and scurrilous statements is his charge that we, as Respondents' attorneys, "surreptitiously record[ed]" a telephone conversation with Petitioner prior to the commencement of this action (Petition p. 5n.3). We categorically deny having taped that, or any other, conversation with Petitioner or his attorney. Another is the scurrilous attack (Petition p. 25) on MAI and its present chairman Raymond Kurshan, on the ground that a former chief executive officer was sued; aside from the unacceptable suggestion of guilt by former association, Petitioner fails to mention that the allegations in the very old complaint were never upheld by any court.

consummation of the redemption, as well as damages in an amount not to exceed $41,582,705 plus interest, punitive damages in the amount of $20,959,025, and attorneys' fees in the amount of $838,361.

* * *

"The redemption proposal was overwhelmingly approved by MAI's shareholders: 87.96 percent of the outstanding C shares and 66.89 percent of the outstanding common shares were voted in favor of the redemption, while only 2.93 percent of the outstanding C shares and .89 percent of the outstanding common shares were voted against it. Based on that vote, the redemption was consummated on September 28, 1978 (271a)."

Summary of Argument

1. Summary judgment was particularly appropriate here because Petitioner did not even attempt to carry his burden of setting forth, by affidavit (or other admissible evidence), specific facts showing that there was a genuine issue for trial. Petitioner was not entitled to deferral of summary judgment pending discovery because he failed to demonstrate the necessity for such discovery.

2. Petitioner's claims with respect to the propriety of the Supplementary Proxy Statement lack merit because the demonstrated sufficiency of the original Proxy Statement made the Supplementary Proxy Statement superfluous, Petitioner offered no factual support for his attacks on the sufficiency of the Supplementary Proxy Statement, and MAI was not required to make a completely new proxy solicitation or to obtain the District Court's advance approval of the Supplementary Proxy Statement.

3. The information sought by Petitioner concerning the $16.8 million intercorporate credit was disclosed in the proxy materials; all other related information Petitioner sought was irrelevant and immaterial. Petitioner's claim that there was a 1974 securities law violation with respect to the issuance of the C Stock is factually and legally baseless. Petitioner's claim of waste and diversion of assets was a pendent state law claim properly dismissed with prejudice because the District Court properly addressed that claim in conjunction with its review of the federal claims, and the record demonstrates that the pendent claim was baseless.

4. Petitioner's claims with respect to the alleged "real purpose" of the directors in proposing redemption of the C Stock lack merit because there is no factual support in the record for those claims and proxy materials need not contain descriptions of directors' motives and purposes where, as here, the facts disclosed are sufficient to permit shareholders to reach their own conclusions.

5. Petitioner's protest against the District Court's allegedly "punitive" motive for dismissing the complaint is baseless and inappropriate for Supreme Court review. Respondents were entitled to attorneys' fees on Petitioner's post-judgment motion because the District Court's finding that the motion was "frivolous and wholly without merit" was well grounded in the record.

Argument

Rule 17.1 of the Rules of this Court provides that a petition for writ of certiorari "will be granted only when there are special and important reasons therefor." No such reason exists in this case. Respondents' motion for summary judgment dismissing the complaint was properly granted because there were no genuine issues of material fact and Respondents were entitled to judgment as a matter of law by the application of well settled legal principles which do not warrant the attention of this Court:

I

Petitioner did not submit any affidavits (or other admissible proof) in support of the allegations in his complaint[4] and thus failed to raise any genuine issues of material fact in opposition to Respondents' motion for summary judgment. Fed.R.Civ.P. 56(c), 56(e); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 159n.20 (1970); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968); *Ness* v. *Marshall*, 660 F.2d 517, 519 (3d Cir. 1981); *Burst* v. *Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981); *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978); *Donnelly* v. *Guion*, 467 F.2d 290, 291 (2d Cir. 1972).

Moreover, as noted by the Courts below (PA2, 8, 12 & n.6, 15, 16), Petitioner admitted at his deposition that many

4. The only affidavits submitted by Petitioner in opposition to Respondents' motion for summary judgment were conclusory attorney's affidavits (947A, 950A, 962A) submitted in support of Petitioner's motions for an adjournment and to defer summary judgment pending discovery; none of those affidavits addressed the merits of the summary judgment motion.

of the allegations in his complaint were based upon nothing more than conjecture and speculation, and thus were properly dismissible by summary judgment. *SEC* v. *Research Automation Corp., supra,* 585 F.2d at 33; *Williams* v. *McAllister Brothers Inc.,* 534 F.2d 19, 24 (2d Cir. 1976); *Dressler* v. *MV Sandpiper,* 331 F.2d 130, 132-33 (2d Cir. 1964); *Horwitz* v. *Sprague,* 440 F. Supp. 1346, 1351-52 (S.D.N.Y. 1977).

Petitioner also failed to make the showing required by Fed.R.Civ.P. 56(f) in support of his motion to defer summary judgment pending discovery, and thus that motion was properly denied below. The affidavits of Petitioner's attorney (951A-952A, 963A) stating, in wholly conclusory fashion, that discovery would be necessary to oppose the motion for summary judgment were clearly insufficient. *Contemporary Mission, Inc.* v. *United States Postal Service,* 648 F.2d 97, 107 (2d Cir. 1981); *Over The Road Drivers, Inc.* v. *Transport Insurance Co.,* 637 F.2d 816, 820 (1st Cir. 1980); *SEC* v. *Spence & Green Chemical Co.,* 612 F.2d 896, 900-01 (5th Cir. 1980), *cert. denied,* 449 U.S. 1082 (1981); *Willmar Poultry Co.* v. *Morton-Norwich Products, Inc.,* 520 F.2d 289, 294 (8th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976).

II

Petitioner's attack on MAI's Supplementary Proxy Statement is irrelevant, factually unsupported and without any legal basis.

First, the propriety of the Supplementary Proxy Statement is an academic question because the District Court

unequivocally found that "there were no deliberate nor material omissions from the initial proxy" (PA10).

Second, since, as noted, Petitioner did not submit any factual affidavits in opposition to Respondents' motion for summary judgment, there is no support for his present claims (Petition pp. 10-16) as to the "true purpose" of the Supplementary Proxy Statement, that it was "falsified" or "deliberately withheld" or that MAI shareholders lacked sufficient time to change their proxies if they so desired.

Finally, Petitioner's arguments (Petition pp. 16-22) that complete resolicitation of proxies and advance approval of the Supplementary Proxy Statement by the District Court were required are both without legal merit. *Missouri Portland Cement Co.* v. *H.K. Porter Co.*, 535 F.2d 388, 396 (8th Cir. 1976); *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 255 (2d Cir. 1973); *Corenco Corp.* v. *Schiavone & Sons, Inc.*, 488 F.2d 207, 214-15 (2d Cir. 1973); *Bertoglio* v. *Texas International Co.*, 488 F. Supp. 630, 654-55 (D. Del. 1980); *Cohen* v. *Ayers*, 449 F. Supp. 298, 315 (N.D. Ill. 1978), *aff'd*, 596 F.2d 733 (7th Cir. 1979); *Lessler* v. *Dominion Textile Ltd.*, 411 F. Supp. 40, 42 (S.D.N.Y. 1975); *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 602 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir.), *cert. denied*, 419 U.S. 870 (1974); *Abramson* v. *Nytronics, Inc.*, 312 F. Supp. 519, 524-26 (S.D.N.Y. 1970).[5]

5. The cases cited by Petitioner (Petition pp. 16-17) in which resolicitation of proxies was required are all inapposite because, among other things, they involved multiple and/or extreme violations of the proxy rules. In any event, Petitioner admits that resolicitation is not required in every case (Petition p. 18) and there is nothing in the record indicating that the Courts below abused their discretion in determining that resolicitation was not required in this case. Indeed, such resolicitation would have been superfluous since, as noted, the initial proxy materials were found to be complete and accurate in all respects.

III

Petitioner's claims with respect to the alleged diversion by MAI of $16,800,000 of the assets of Genesis One Computer Corporation ("GOCC"), the wholly-owned subsidiary whose Cash Flow From Operations (as defined; see 97A) would have been the source of C Stock dividends, are factually and legally baseless.

As the Courts below found (PA2, 15n.8), the existence of this intercompany debt and the fact that it was non-interest bearing were fully disclosed in MAI's proxy materials (see PA53-54). The "explanation" of other aspects of this item sought by Petitioner (*e.g.*, "how long the situation had existed;" Petition p. 24) was immaterial, especially in view of the fact that repayment of the debt by MAI would not have resulted in C Stock dividends since it would not have been included in the definition of Cash Flow From Operations (see 97A).[6] Hence, there was no violation of the proxy rules.

Petitioner's claim that "There Was a 1974 Securities Violation" (Petition p. 24) is improperly raised here because it is based on "a fact issue as to intent in 1974" (*id.*) as to which Petitioner offered no evidence below. In any event, Respondents affirmatively demonstrated below that there was no impropriety as to the issuance of the C Stock in 1974 (313A-314A); indeed, the proxy statement and prospectus relating thereto were fully reviewed, as required, by the Securities and Exchange Commission.

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6. In any event, the record is clear that MAI regularly kept its shareholders and the SEC informed as to all relevant aspects of the intercompany debt (see, *e.g.*, 475A, 1075A, 1084A, 1087A, 1090A, 1093A; see generally 1049A-1053A).

Petitioner's claim of waste and diversion of assets is not only unsupported by any evidence in the record,[7] but it also does not even rise to the level of a federal securities law claim. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477-79 (1977); *Gaines* v. *Haughton*, 645 F.2d 761, 776-79 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1006 (1982); *Browning Debenture Holders' Committee* v. *DASA Corp.*, 560 F.2d 1078, 1084 (2d Cir. 1977); *Gluck* v. *Agemian*, 495 F. Supp. 1209, 1213-14 (S.D.N.Y. 1980); *Merritt* v. *Colonial Foods, Inc.*, 499 F. Supp. 910, 913-14 (D. Del. 1980).

Rather, Petitioner's claim is a state law claim that requires a showing of bad faith on the part of MAI's directors. *Galef* v. *Alexander*, 615 F.2d 51, 57 (2d Cir. 1980); *Schenker* v. *E.I. du Pont de Nemours & Co.*, 329 F.2d 77, 79 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964); *Elfenbein* v. *American Financial Corp.*, 487 F. Supp. 619, 627 (S.D.N.Y. 1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981); *Pollitz* v. *Wabash R.R. Co.*, 207 N.Y. 113, 124, 100 N.E. 721, 723-24 (1912); *Greenbaum* v. *American Metal Climax, Inc.*, 27 A.D.2d 225, 231, 278 N.Y.S.2d 123, 129 (1st Dept. 1967). Since, as noted, Petitioner failed to make such a showing, his state law claim was properly dismissed.[8]

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7. As the District Court stated, "No factual information by affidavit or otherwise is offered in support of this speculation" (PA15 n.8), and Petitioner admitted at his deposition that he had no basis for those allegations (596A-599A). By contrast, Respondents affirmatively demonstrated, in their affidavits in support of their motion for summary judgment, that no such waste or diversion had occurred (316A-319A).

8. Petitioner's argument that he should have been permitted to pursue his state law claim in state court is without merit. Well settled principles of pendent jurisdiction permit a District Court, in its discretion, to dispose of pendent state law claims on the merits

(footnote continued on next page)

IV

Petitioner's claim that factual issues as to Respondents' "purpose and intent" in proposing the redemption of the C Stock precluded summary judgment are factually and legally without merit.

Since, as noted, Petitioner did not submit *any* factual affidavits in opposition to Respondents' summary judgment motion, the record is barren of any evidence in support of Petitioner's speculations that Respondents' motives were to "freeze out" the C shareholders from participating in future MAI profits.[9] Hence, that issue is not properly raised here.

Moreover, there is no requirement that proxy materials disclose directors' motivations where, as here, sufficient facts are furnished from which shareholders can reach their own conclusions.[10] *Rodman* v. *Grant Foundation*, 608 F.2d 64, 71-72 and n.5 (2d Cir. 1979); *Golub* v. *PPD*

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despite the dismissal of the federal claims. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725-27 (1966); *Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970); *Hagans* v. *Lavine*, 415 U.S. 528, 545-46 (1974); *Lentino* v. *Fringe Employee Plans, Inc.*, 611 F.2d 474, 478-79 (3d Cir. 1979). And, it is appropriate to address, and dispose of, pendent claims on a motion for summary judgment. See, *e.g.*, *Ryan* v. *J. Walter Thompson Co.*, 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972); see also *State of Arizona* v. *Cook Paint and Varnish Co.*, 541 F.2d 226, 228 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

9. Petitioner's reference (Petition p. 27n.21) to purported "admissions" by Respondents is unsupported by any citation to the record, and in fact there were no such admissions.

10. Here it is obvious from the terms of the proposed redemption that the C shareholders would not be participating in MAI's future business activities, which Petitioner claims was the "real purpose behind the redemption" (Petition p. 27).

Corp., 576 F.2d 759, 765 (8th Cir. 1978); *Selk* v. *St. Paul Ammonia Products, Inc.*, 597 F.2d 635, 639 (8th Cir. 1979); *Lewis* v. *Oppenheimer & Co.*, 481 F. Supp. 1199, 1204 (S.D.N.Y. 1979); *Doyle* v. *Milton*, 73 F. Supp. 281, 286 (S.D.N.Y. 1947). See also *Browning Debenture Holders' Committee* v. *DASA Corp.*, *supra*, 560 F.2d at 1084.[11]

V

Petitioner's final argument is that the dismissal of his complaint somehow constituted a "forfeiture"[12] visited upon him by a Court which "was in a punitive frame of mind" and which should have "better controlled the situation" to protect Petitioner from the admitted shortcomings of his attorney (Petition pp. 28-30). This totally baseless argument not only unfairly impugns the integrity of the District Court, but also fails to present any "special and important" circumstances justifying the time and attention of this Court.

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11. Petitioner's reliance (Petition p. 27) on *SEC* v. *Parklane Hosiery Co.*, 558 F.2d 1083 (2d Cir. 1977), is misplaced because there, unlike here, no facts were disclosed from which the shareholders could deduce the principal shareholder's alleged motives and, in addition, those motives violated state law.

12. Petitioner also complains that the District Court's award to Respondents of attorneys' fees in the amount of $6,000, incurred by them in opposing Petitioner's motion for post-judgment relief, was a "penalty" (Petition p. 30). However, that award was proper because, as the District Court found, Petitioner's motion (which sought, among other things, $100,000 in attorneys' fees for having brought, prosecuted and lost the action) was "frivolous and wholly without merit" (PA19). See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975); *Hall* v. *Cole*, 412 U.S. 1, 5, 15 (1973); *Interstate Cigar Co.* v. *Sterling Drug Inc.*, 655 F.2d 29, 32 (2d Cir. 1981); *Nemeroff* v. *Abelson*, 620 F.2d 339, 348 (2d Cir. 1980); *Browning Debenture Holders' Committee* v. *DASA Corp.*, *supra*, 560 F.2d at 1087-88; *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (2d Cir. 1973); 6 Moore *Federal Practice*, ¶ 54.77 [2] at 1709-12 (2d ed. 1982).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

Dated: New York, New York
August 26, 1982

Respectfully submitted,

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NO. 82-138

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

OVERVIEW[1]

As pointed out by respondents, the decision of the District Court (PA 4) has been published at 519 FS 83. The

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[1]Petitioners will continue the abbreviated references explained in footnote 1, page 1 of the petition. Additional abbreviations: (Ptn. ___) — Petition for Certiorari filed herein; (Br.Op.___) — Respondents' Brief in Opposition filed herein. Petitioners' Appendix attached hereto will be abbreviated as previously (PA___), but pagination will arbitrarily commence with (PA 101).

Unless otherwise indicated, all emphasis has been supplied.

publication was overlooked because it did not appear in the advance sheets until the addition of approximately October 6, 1981.

The strident tone of respondents' brief in opposition suggests that the case was incorrectly decided. Petitioners submit that it is respondents who are presenting unsupported claims. A principal objective of this reply is to present a supplemental appendix establishing that respondents' contentions are unsupported.

Respondents argue that the redemption was "overwhelmingly" approved, but such proposition is immaterial to an action such as this grounded upon "corporate therapeutics." Indeed, prosecution of this action has been "overwhelmingly" approved by 94.01% of the C shareholders, only 87 exclusion requests being received when class notices were mailed (241, 50A).[2]

---

[2]Respondents' denials of tape recordings are late in coming, so late that they cannot be tested without remand. Judge Howell, at his deposition demanded to know if his conversations had been recorded but respondents' counsel expressly refused to inform him (PA 102). When petitioners filed a notice to produce asking for tape recordings (965A, item 68) respondents refused production on grounds of vagueness and "work product" (989A). Meanwhile, our statement that the proposal for a "private" settlement emanated from respondents, not petitioners, stands unchallenged (Ptn.n.3, PA 61n.9).

It does not offend the Constitution for law enforcement officials detecting crime with consent of one party to record conversations. However, bar groups nationwide have declared such activities by private attorneys in civil litigation unethical.

Respondents' own exhibit states that in January, 1974, Walter Oreamuno and his wife were forced to resign as directors of MAI, that his long term employment contract and options were canceled and that suit against him was pending, "as a result of * * * (his) conduct in connection with the Mexican printing plant subsidiary * * *" (417A). We have no further information and deny any intent to imply that respondent Kurshan had any involvement in that matter. Petitioners reiterate that in the past, MAI executives have not always exhibited high standards of corporate accountability.

REPLY TO POINT I

Respondents have lumped their answer to questions 1 and 2 into their Point II. By Point I, they renew the argument, heavily relied upon in the courts below, that the entire action of the petitioning class should be forfeit. Such argument is repeated throughout their brief.

The fate of the class has been sealed because, in their view, petitioners failed to obtain or demonstrate the necessity for discovery (Br.Op. 4).

Formation of the class was approved on November 28, 1979 (R. 44, endsmt, 3A). Within three months, on February 25, 1980, by refusing to grant additional briefing time, the Court directly indicated that the MSJ was under final submission and no further opposition would be permitted (Ptn.n.8). Petitioners could not know that the MSJ would remain under submission more than the customary 30 days or so and should not be faulted for failing to attempt discovery of what would not be considered. Additionally, respondents refused discovery on grounds that such was unnecessary "to oppose said motion" (Ptn.n.8) and the Court stated "Mr. Pattison, * * * if I feel that I need something further from you, I will let you know" (PA 32). Under these circumstances, visiting the entire class with forfeiture was unwarranted.[5]

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[5]We think Judge Howell's 410 page deposition has been selectively cited and mischaracterized on the whole, but what difference? Assume the deposition had disclosed that the named plaintiff had a third grade education, a twelve year old mentality and knew nothing about his holdings. Would the deposition entitle respondents to an MSJ by default, especially against the entire class? The question in this and every securities case is the conduct of the defendant. The conduct of the named plaintiff is not in issue.

Neither are summary judgments granted by default. *Adickes v. Kress*, 398 U.S. 144 (70) makes it clear that a controverting affidavit is not a *sine quae non*, that the burden is upon the moving party, and that movant must controvert all material allegations against him. Distinguishing *First Natl. v. Cities*, the Court stated the burden does not shift until movant *"conclusively"* shows the respondents' allegations are without foundation. Such was never done below as demonstrated in the petition and in the Trial Court briefs of 141 pages (R. 52) and 22 pages (R. 59).

The unarticulated contention that it is impermissible to oppose summary judgment by pointing out deficiencies in the movant's proof is untenable.

Respondents have attacked petitioners' affidavits for opportunity to conduct discovery (Br.Op. 7) and they are attached hereto so that the Court may evaluate them (PA 105-113). It has been numerously held that prior to summary judgment, sufficient time for discovery is especially important when relevant facts are within the exclusive control of the movant. *Loews's v. Bays*, 209 F.2d 610, 615 (5-MS 54). The rule has been held specifically applicable to shareholder litigation. *Tobelman v. Pipe Line*, 130 F.2d 1016, 1022 (3-DE 42); *Fogelson v. American*, 170 F.2d 660 (2-NY 48); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2-NY 68) (en banc).

REPLY TO POINT II

Having strongly urged the proxy supplement in the Trial Court, respondents would now dismiss it as "superfluous" (Br.Op. 4), but the Second Circuit has ruled otherwise and both courts relied heavily thereon (Ptn. 11-12).

Respondents are not supported by their authorities. In *Porter*, a tender offer case, following notice and hearing, the Court approved an amended solicitation and lifted a preliminary injunction (*l.c.* 391). Essentially speaking, petitioners urge the same procedure. *Bertoglio* rejected a clean hands argument finding a "public interest * * * above the interests of the parties themselves" and ordered a complete re-solicitation of proxies (*l.c.* 662-3, 4). Likewise, *Cohen* reflects a complete re-solicitation of proxies (*l.c.* 449 FS 306, 316). The failure to "pre-clear" the re-solicitation, if such was the fact, was not raised. However, the Seventh Circuit expressly declined to consider the validity of the re-solicitation (*l.c.* 596 F.2d 737). Nor was re-solicitation addressed in *Lessler* and such would have been futile, the acquiror holding 95% interest. In *Ronson*, whether the court required re-solicitation is unclear, but judicial preclearance was apparently observed (*l.c.* 370 FS 600). In *Abramson* (See Ptn.n. 10), the preliminary injunction hearing was "held in abeyance" meaning that judicial consent was obtained (*l.c.* 523). It was not until after the supplement had been circulated with judicial consent that plaintiff urged judicial preclearance and re-solicitation; obviously, too late.

It is completely incongruous in a securities case to require studied preclearance of the class notice (See 207, 11, 20, 8, 37, 8 & 41 A) and of any notice of proposed settlement, but to leave management, the only party with power to do so, free to build its defenses unilaterally. A rule holding that communications not precleared may not be considered equalizes an unequal situation without First Amendment implications. None of respondents' cases goes nearly as far as the present facts where a midnight supplement was rushed out for the purpose of creating a defense to a pend-

ing case, after the filing thereof, without consent of court or notice to opposing counsel, and without the re-solicitation of proxies; thus allowing respondents to retain the benefit of their unlawful solicitation. Such action should not stand.[4]

REPLY TO POINT III

Respondents have not answered the proposition that there was a 1978 securities violation (PA 23-24) and the same should be sustained. Neither have they questioned our calculations showing that a minimum of $5.98 million has been diverted, now amounting to $7.37 per C share.

While it is contended that "the information sought" was "fully disclosed" (Br.Op. 5, 9), respondents point to nothing in the original and point only to unaudited financial statements in the supplement (PA 53-4).[5]

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[4]The original solicitation is argued as "complete and accurate" (Br. Op.n. 5), but the courts below relied heavily upon the supplement mandating as minimal relief, a remand for reconsideration. $40 of the $50 face amount of the C shares was payable solely from GOCC cash flow, but no GOCC financials were provided in the first round. Would a C shareholder consider them important particularly when, as now admitted, they would have shown that MAI had failed ever since 1974 to provide any return to GOCC upon the bulk of GOCC's assets? Obviously!

[5]The supplement goes no further than showing $16.8 million "Due from affiliated companies" at September 30, 1977. The operating summary (PA 53) is a condensed statement reflecting substantial "miscellaneous" revenue and reflecting interest expense and "parent company charges" both as being "net" items of expense. The term "net" means that interest income and parent payments have been offset against interest and parent expense leaving a "net" expense in the amount shown. The fact that the $16.8 million was non-income producing simply cannot be verified. After calculating what the $16.8 million should be producing, a trained analyst might surmise that, if the $16.8 million had been outstanding for the entire period, the miscellaneous interest and parent company items do not seemingly reconcile with the notion that a fair return is being allowed, but there is nothing on these two pages from which the matter can be clarified. Our suspicions were not confirmed until the filing of respondents' brief on appeal (Ptn. 22, 23).

Respondents contend they "affirmatively demonstrated * * * no impropriety" in 1974, but the reference to the affidavit of their general counsel, respondent Berend (PA 113) establishes nothing.[6] The full text of the 1974 prospectus (366-461A) and of the 1974 proxy (469-542A) were attached to their MSJ, but they have pointed to nothing whatever in the prospectus and find (Br.Op.n. 6) only one innocuous phrase in the proxy (PA 116). Was this a sufficient disclosure that the bulk of the assets of the subsidiary had been farmed out to "affiliated companies" with no arrangements for reimbursement or negotiation to secure compensation for the use thereof? We think not.[7]

Santa Fe and like citations (Br.Op. 10) have no relation to pendent claims. The matters recited (Ptn. 22-26) demonstrate that viewing the record in the light most favorable to petitioners, respondents did not "conclusively" establish that petitioners have no state law action to be compensated for use of the $17 million.[8]

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[6]It is further well established that SEC clearance is no defense to a shareholder action such as this. **J. I. Case v. Borak**, 377 U.S. 426, 432 (64).

[7]The remaining reference in footnote 6 are to a portion of a Trial Court brief (1049-1053A) filed November 26, 1980, (Item 63, 4A) and attachments thereto. Apparently, the attachments are extracts from reports to shareholders duing 1976 (1075A) and 1975 (1087A) plus extracts from SEC filings around January 1, 1975 (1084A), during January, 1977 (1090A) and November, 1976 (1093A). Such method of presenting summary judgment proof is improper. Further, the Trial Court had ordered petitioners not to respond (PA 32). Substantively, the referred to items, all being circulated after the 1974 flotation of C shares, could not have affected the validity of the prospectus and proxy solicitation had they spelled out the facts in bold black letters (which they fail to do).

[8]It is contended (Br.Op.n. 7) that the affidavits for summary judgment "affirmatively demonstrated" no waste or diversion of assets. Such affidavits (PA 118) are by counsel, are conclusory in nature, do not demonstrate the competency of the affiants to testify, and are incompetent. R. 56(e) FRCVP.

Respondents argue the "pendent claim was baseless" (Br.Op. 5) presenting unsupportive "bad faith" citations (Br.Op. 10).[9] No such authorities or argument were ever mentioned below, thus requiring remand. Never did they present by affidavit or otherwise that they had ever specifically considered the necessity of returning assets to GOCC or paying compensation thereon, and had expressly decided that such was unnecessary. Instead, they argued below that "waste and mismanagement * * * is not part of this action" (PA 24), thereby causing the failure of the Trial Court to fully develop pendent claims. Nothing in the record suggests the courts below found an exercise of reasonable business judgment carried out in good faith and such a holding by summary judgment where nothing at all was paid is unsupportable.[10]

Petitioners ask the Supreme Court to extend the rule of comity set forth in *Gibbs* to provide that where all federal issues are disposed on summary judgment, any pendent claims must be dismissed without prejudice unless the district court affirmatively holds that the pendent issues were fully developed and there is no hope of success thereon before the state court. Compare: *Anders v. CA*, 386

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[9]Respondents' authorities are not supportive. In **Galef**, summary judgment was reversed for trial on the merits. Neither **Schenker** nor **Pollitz** was a summary judgment case. We further present in connection with question 4 that state of mind issues (intent — if such proof was required to make out a 1974 violation, see Br.Op. 9; or "good faith"; or bad faith) can rarely be decided on summary judgment.

[10]Under New York law, an officer or director may not be held to pay damages out of his pocket unless he acted corruptly or in bad faith or was grossly negligent. **Clayton v. Farish**, 73 NYS 2d 727 (NYSM 47). However, petitioners present a claim for unjust enrichment asking that GOCC receive such compensation from its parent and affiliates that respondents were equitably obliged to provide in the exercise of their fiduciary duties in the first instance. In such instance, a lesser standard applies. **Diamond v. Oreamuno**, 248 N.E. 2d 910 (NYAP 69).

U.S. 738 (67). Such reasonable balancing of federal-state interests mandates reversal.

REPLY TO POINT IV

Of course, it was "obvious" that the C shares would not participate "in MAI's future business activities," (Br. Op.n. 10), but the distinction is a non-distinction. It was obvious to the outside shareholders in *Parklane* that their ownership interest would be terminated and also obvious to the outside shareholders in *Rodman* that cash in the corporate till, in which they held an equity, would be distributed in termination of insider shareholdings. The SEC rules require a statement of purpose. 17 CFR §240.14a-101, Sch. 14A, Item 13(c) (78 ed. p. 613). That which should be classed as purpose and subject to disclosure can rarely be distinguished on summary judgment from collateral purpose or incidental motivation, not subject to disclosure.

The following statement pertaining to anti-trust cases pertains equally to securities litigation:

> "Summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. * * * Trial by affidavit is no substitute for trial by jury" *Poller v. CBS*, 368 U.S. 464 (62).

In *Schoenbaum v. Firstbrook*, supra, 218, it was stated that summary judgment should rarely be granted in a stockholder action and that issues as to knowledge, intent and motive will ordinarily require a full trial. See also *TSC v. Northway*, 426 U.S. 438 (76) holding summary judgment inapplicable to securities actions unless the facts are such

that reasonable minds cannot differ. Respondents' authority (*Ness*, Br.Op. 6) is in agreement.[11]

REPLY TO POINT V

The $6,000.00 award was obviously penal; for imposing upon the court an allegedly "frivolous" motion. The motion was not frivolous nor has any intent to harass or other improper motive been found or shown. The penalty was improper.

However, the real thrust of question five is overkill. $6,000.00 is still important money to most people, but it is nothing compared to the $5.98 million and more assessed against the class (Ptn. 23). Just as respondents have resolutely ignored the class by speaking in the singular, they have also avoided recognizing the real penalty, being imposed upon 2,000 wholly innocent class members.

Respectfully submitted,

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[11] "Freeze-out" situations have been characterized as "internal mergers." The hallmark of the freeze-out is that those in control and having superior knowledge manipulate the corporate structure to their advantage. Knowing that assets are undervalued and business prospects bright, they force the minority to liquidate below intrinsic value; the **Parklane** situation. Conversely, if prospects are dimming, the insiders distribute the cash and other merchantable assets to themselves and "bail-out"; the **Rodman** situation as alleged.

Preferred shareholders are particularly vulnerable to such maneuvers are frequently targets thereof. For such reason, the purpose of freezeouts must be carefully examined. Brudney, **Limits of Preferred Modification**, 26 Rutgers LR 445, 462-463 (73), Brudney, **Going Private**, 61 VALR 1019 (74), **SEC Going Private Rule**, 4 DE J. Corp. L. 184 (78), **Going Private**, 28 Emory LJ 111 (79), 1 Lipton & S, **Takeovers**, 420-1 (NYLJ Press 78).

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PETITIONERS' SUPPLEMENTAL APPENDIX

[EXCERPT FROM] DEPOSITION OF PLAINTIFF CHARLES BEN HOWELL

[Same district court, case name and number as before; taken October 17, 1978]

"Q. [BY MR. WALPIN] * * * Did you prior to the commencement of the lawsuit make an offer or authorize

anyone on your behalf to make an offer to settle — to refrain from filing this lawsuit if MAI would settle with you individually? * * * I think you know my question. Are you refusing to answer it? A. The answer is a categorical no. * * *

"Q. Did you at any time up through the present day offer to settle the case by withdrawing the complaint, in return for attorneys' fees? A. And I will ask you, sir, if you made any type of tape recording, electronic recording or other type of verbatim recording of our conversations. If so, I demand that they be produced so that I can refresh my memory.

"Q. Mr. Howell, I am asking you for your testimony. A. I am presuming that you are declining to respond to my request for this disclosure of what type of recording you have made of our conversations, if any.

"Q. Mr. Howell, you are correct, I am declining to respond to that. A. Well, I will proceed to give you my recollections, and I think they are accurate. On a Saturday morning immediately after you received the draft complaint, whatever exhibit number it was, that you made two long distance telephone calls to my office, you initiated them both. And in the first conversation you proposed to me that the company was willing to — you didn't discuss any figures, I don't believe, but you stated that the company was willing to make a settlement proposal if I would omit my prayer for injunctive relief, a settlement proposal to me personally. And then you immediately thereafter, in the next five or ten minutes, initiated another telephone call stating that the company would also require that I omit my class action allegation from my pleading in order for the company to make me a personal settlement proposal.

"MR. WALPIN: I am going to have to look for something for a moment, if we may have a moments recess. (Brief recess). [Petitioners' note: At this time, counsel left the room and returned with a file containing a transcript or memorandum of some sort. He proceeded to examine the witness while referring thereto.] BY MR. WALPIN: Q. Mr. Howell, do you recall what date was this that you say this occurred, this conversation? A. I would have to have a calendar to pin it down but I recall that it was a Saturday.

* * *

"Q. Would July 29th, a Saturday, be correct? A. I suspect that's correct, yes, sir.

* * *

"Q. Do you recall that on Friday, July 28th, I telephoned you to tell you I was authorized to accept service on behalf of the proposed defendants? A. You did give me that message, impart that message somewhere along the line. Whether the date is correct I am not sure, but that sounds about right.

* * *

"Q. And do you recall I also told you that as a litigating attorney, I recognized, however, that every lawsuit, even one totally without merit, has a nuisance value for settlement purposes, in view of the litigation expenses involved? A. Those words — I don't recall the words as being phrased exactly like that, but I do recall you stating that, that it was worth something to the company to be — to avoid a lawsuit like this.

* * *

"Q. Do you recall my stating to you the requirement that MAI could not even consider a nuisance value settlement at that time? A. I don't believe you put it in those words, no, sir; that is not my recollection. If you are reading from a tape recorded transcript, I would like to see it, or another verbatim transcript, I would like to see it at this time.

"Q. And was there any explanation by anyone as to what the requesting of an injunction or not requesting of an injunction would have to do with any settlement? A. Your statement to me in the first conversation was that if the prayer for injunctive relief was omitted, then you could be willing to recommend a settlement to the company after the shareholders meeting; but before the shareholders meeting, that your hands were tied, I believe you used that phrase, because in your opinion the Securities Act would require you to disclose any settlement made if it was effected prior to the date of the shareholders meeting. And I believe you used the phrase 'we'll be free from that restriction once the shareholders meeting has gone by, and I would suggest to you that the best way to settle this thing, Mr. Howell, would be to omit the prayer for injunctive relief, the prayer for temporary restraining order,' I believe. That is my best recollection of the conversation.

* * *

"Q. Now, isn't it a fact I told you that I could not at that point make any agreement or give you any commitment or give you anything to rely on that even nuisance value settlement could be agreed to after — A. You had some disclaimers in there, the company hadn't authorized you to offer anything, but you felt that they would probably

go along with a reasonable recommendation from you, or something like that; the standard lawyer language."

[907-17A]

[PAGES 947-949, JOINT APPENDIX, 2d CIRCUIT, BEING AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 5, 1980]

[Same district court, case name and numbering as before]

* * *

On approximately December 12, 1979, defendants filed their motion for summary judgment in this case. The total length of the motion, affidavits, brief and other documentation filed by defendants was 394 pages. Defendants demanded that plaintiffs respond thereto on December 26, 1979. Plaintiffs asked additional time to respond to this motion and pursuant to request, the Court has granted extensions of time to plaintiffs to and through February 25, 1980.

3. On February 24, 1980, plaintiffs transmitted to the Court by express mail a brief in opposition covering several of the issues raised in this case plus a request for additional time to fully respond to the defendants' motion for summary judgment.

4. On February 27, 1980, the undersigned attorney was notified by telephone call from court personnel to the undersigned attorney's office that the request for additional time to respond to the motion for summary judgment had been denied.

5. Plaintiffs tender herewith their completed brief. Plaintiffs request that the Court reconsider its ruling dated

February 27, 1980, that the time to respond to defendants' motion be extended to and through the date of filing of the within motion, and that the brief tendered herewith be held and considered to be timely filed.

6. Counsel would show that counsel has acted in this matter as diligently as possible. The undersigned attorney is a solo general practitioner and since the service of defendants' motion, this attorney has been required to make numerous appearances in many courts. The sheer size of defendants' pleadings required extensive time for analysis. Defendants cited approximately 102 different authorities, all of which had to be read and analysed. Extensive time was required just to digest the defendants' pleadings.

7. Thereafter, it was necessary for the undersigned counsel to engage in extensive fundamental research in order to prepare his brief in response to defendants' motion. The completed brief contains 19 separate issues, many of them containing sub-issues. Numerous authorities are cited. The total length of the brief is 141 pages. Plaintiffs have attempted to be thorough and exhaustive and to brief all of the law applying to all aspects of the case. The time consumed was extensive. The undersigned counsel has done his utmost to comply with the time deadlines fixed by the Court, but it was physically impossible to do so. In hindsight, he realizes that he could (and possibly should) have done a less thorough job and stay within the time limits fixed by the Court, but it was physically impossible to do as thorough a job in any less amount of time.

8. It is submitted that defendants have been put to no imposition and that the granting of this motion will not

unreasonably delay the disposition of the case.

[Here omitting balance of affidavit.]

[947-9A]

[PAGES 950-952, JOINT APPENDIX, 2d CIRCUIT, BEING PARTS OF AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 16, 1980]

[Same district court, case name and numbering as before]

* * *

Plaintiffs have variously presented in their brief and supplemental brief opposing summary judgment that discovery is needed in order to fully oppose certain of defendants' summary judgment claims. In their reply brief, defendants strongly argue that plaintiffs should not be granted additional time for discovery.

5. It is submitted that the very nature of the case, as pleaded in the complaint, reflects that practically all relevant information lies within the control of defendants. Neither plaintiff Howell nor other members of the plaintiff class would, in any likelihood be qualified to testify as to the manner in which the business operations of the corporate defendant, MAI have been conducted. Therefore, the motion for summary judgment is the type of motion which cannot be successfully opposed by affidavits.

6. This affiant affirmatively states that he knows of no person qualified to testify upon trial as to any of the material facts alleged in the complaint; which person would be willing to voluntarily make affidavit in support of plaintiffs' cause of action. Plaintiff Howell's deposition and

plaintiffs' supplemental brief fully set forth the factors upon which the complaint was based, to-wit: defendants' documents, circumstantial evidence and numerous non-evidentiary factors, primarily constituting those matters which plaintiff Howell and the undersigned attorney believed in good faith that they could develop through investigation and discovery prior to the time of trial.

7. In order to oppose the motion for summary judgment, it will be necessary for plaintiffs to take the deposition of the named individual defendants, several corporate officers and managerial employees of MAI, certain persons who were at the time of filing of suit officers and managerial employees of defendant Genesis One Computer Corp., certain persons who were at the time of filing suit, officers and managerial employees of Genesis One Products Corp., and other persons affiliated and identified with defendants.

8. In addition, it will be necessary to obtain discovery of numerous of defendants' records. Considerable time will be required for the analysis thereof. Plaintiffs will in all likelihood need to retain experts to assist in the examination and evaluation of some of the information discovered.

[Balance of affidavit omitted.]

[950-2A]

[EXCERPT FROM PLAINTIFFS' MEMORANDUM IN SUPPORT OF CROSS-MOTION TO DEFER SUMMARY JUDGMENT PROCEEDINGS PENDING DISCOVERY]

[Same district court, case name and numbering as before; Filed March 25, 1980]

It is contended that plaintiffs have not adequately outlined the modes or the objectives of their discovery. We

believe that this has been done very substantially in the original brief and extensively done in the supplemental brief. However, plaintiffs will recapitulate:

(1) Under their first issue, plaintiffs have submitted that defendants have omitted to disclose the "real purpose" behind the redemption of the "C" shares: to expand the company's line of business without allowing the "C" shares to participate therein. Several items of circumstantial evidence are pointed out (Pf.Sp.B. 13-20). Plaintiffs need access to defendants' plans and projections for new ventures. Plaintiffs need access to defendants' plans for the financing thereof. Plaintiffs will need the depositions of defendants' principal officers and financial executives and the persons responsible for the planning and implementation of the Wordstream program.

(2) Plaintiffs submit that MAI management has, since 1974, acted to depress the market price of "C" shares in anticipation of a freeze-out move (Pf.Sp.B. 13, 46). When the redemption proposal was finally presented, the Chairman in his "fairness" discussion relied primarily upon the fact that "C" shareholders were receiving a "27% premium over market price." Plaintiffs need discovery of the reports and information distributed to "C" shareholders and circulated in the investment community specifically relating to "C" shares for comparison with similar information circulated with respect to common shares. Depositions of those company officers charged with shareholder and with public relations will be needed along with their records.

(3) The August 5 letter disclosed for the first time that $17 million out of $22 million of Genesis Computer assets were tied up in "due from affiliated companies" (Pf.

Sp.B. 14, 46). It is necessary to discover the complete balance sheets of Genesis Computer for a five year period including a complete itemization of this item to determine how it arose. The operating statements of Genesis Computer for the same period must be discovered to obtain what compensation Genesis Computer received in this connection. The depositions of those responsible for this unseemly diversion of assets must be taken in order to determine whether they made fair and reasonable provisions for the protection of "C" shareholders in farming out the assets of Genesis Computer to other subsidiaries.

(4) Plaintiffs have urged that defendants are in the process of spending $15 million to enter the Wordstream business (Pf.Sp.B. 16-17, 46). Defendants have evasively responded, both in the August 5 letter and in this Court that no such expenditures have affected cash flow payable to "C" shareholders. Contrariwise, we present that plaintiffs were entitled to know in voting their proxies that defendants were in the process of spending almost $20 per "C" share on projects upon which plaintiff "C" shares had first call on the profits. Discovery is needed of the expenditures made, committed and budgeted by the parent and all subsidiaries in this respect.

(5) At the time the redemption proxy went out, the rights of "C" shareholders were subject to the rights of the holders of overhanging debt, which was sopping up the majority of otherwise available cash flow income (Pl.Sp.B. 47). Plaintiffs are unable to reconcile the 1976 and 1977 distributions to "C" shareholders with the amounts of cash flow paid on overhanging debt as reflected by MAI's published reports. Plaintiffs need discovery of the complete terms and provisions of the overhanging debt plus all cash

flow statements, comments and correspondence passing between MAI and the holders of the overhanging debt.

(6) The overhanging debt reached pay-out status in September, 1979 instead of "not later than July 10, 1980" as stated in the proxy material; thereby understating the availability of cash flow to the "C" shareholders by a total of $1.97 per share (Pl.Sp.B. 50). Plaintiffs need discovery of the cash flow projections on which defendants based their "not later than July 10, 1980" statement, and may need further historical discovery to determine the bona fides of this misprojection of pay-out date.

(7) Reading between the lines of the proxy material, it appears that Genesis Computer was forced to absorb all of the competitive price reductions necessary to market the G-Series terminals and that the manufacturing subsidiary retained its profit margins intact (Pl.Sp.B. 51-52). Discovery of the propriety of this matter is imperative. The complete financial statements of the manufacturing subsidiary must be obtained and the depositions of those responsible for inter-subsidiary pricing are needed.

(8) The August 5 letter indicates that the manufacturing subsidiary was obtaining a disproportionate share of the operating profits being generated by the new Wordstream equipment (Pl.Sp.B. 52-54). Discovery of the same sources is necessary in order to check into the propriety of this practice.

(9) The financial statements of Genesis Computer were entirely withheld from view until August 5, 1978 and the statements produced were only fragmentary and uncertified. Plaintiffs' allegation that reasonably detailed financial statements in certified forms were readily avail-

able at modest expense from independent accountants' work papers has been ignored throughout (Pl.Sp.B. 113-115, 124-127). Depositions of the auditors and discovery of their work papers are necessary to support this allegation.

(10) Plaintiffs further need the three items of discovery mentioned by defendants (Df.Rp.B. 13-14). We will respond to the argument of irrelevancy in our response to defendants' Reply Point III below.

The foregoing list is not exhaustive. It is merely illustrative of the fact that discovery in the case is necessary and that plaintffs should have an opportunity to obtain discovery.

[R. 58/8-11]

[PAGES 962-963, JOINT APPENDIX, 2d CIRCUIT, BEING PARTS OF AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 25, 1980]

[Same district court, case name and numbering as before]

* * *

A brief entitled "Plaintiffs' Response to Defendants' Reply Brief In Support of Defendants' Motion For Summary Judgment" and also entitled "Plaintiffs' Memorandum In Support of Cross-Motion to Defer Summary Judgment Proceedings Pending Discovery" was filed on March 24, 1980. On pages 8-11 of such brief, plaintiffs have outlined the matters as to which they seek discovery, the form of discovery desired and the nature of the information which the plaintiffs seek by discovery.

4. Co-counsel has suggested that such a statement should be in the form of an affidavit rather than merely

stated in a brief, and for such purpose, plaintiffs hereby submit the within supplemental affidavit.

Affiant states that he has read pages 8, 9, 10 & 11 of plaintiffs' aforesaid Brief In Response, Etc. All statements of fact therein contained are true and correct to the best of affiant's knowledge. Affiant believes that discovery as there outlined is necessary to the presentation of plaintiffs' cause of action and to further oppose the motion for summary judgment, all for reasons therein stated. Plaintiffs' desire to obtain discovery is not for the purpose of delay nor for the purpose of putting defendants to expense, imposition or embarrassment. Affiant believes and has reason to believe that the desired discovery procedures will establish and prove plaintiffs' cause of action.

[Formal closing parts omitted.]

[962-3A]

[PAGES 313-314, JOINT APPENDIX, 2d CIRCUIT, BEING PORTION OF SUMMARY JUDGMENT AFFIDAVIT OF ROBERT W. BEREND, GENERAL COUNSEL, MANAGEMENT ASSISTANCE, INC. DATED DEC. 10, 1979]

[Same district court, case name and numbering as before]

11. Alleged Failure to Disclose Efforts to Make, and Alleged Fraud in Failing to Make, a Secondary Securities Offering. (Complaint ¶¶ 37, 38)

Referring to the provision in MAI's Certificate of Incorporation under which C shareholders would be entitled to receive 50% of the proceeds from a securities offering by any MAI domestic subsidiary (after certain debt obliga-

tions had been paid), the complaint alleged that the Proxy Statement is defective in failing "to disclose what efforts defendants have engaged in to make any securities offering up to this date" (Complaint ¶ 37).

The simple answer, as set forth in the Supplementary Proxy Statement, demonstrates the lack of materiality of this omission: "The Company is not required to make, nor has it made any representation that it would make, any efforts in this connection, and has no present plans to effect any such offering. Management does not believe that any such offering is in the Company's interest" (p. 7).[31]

Plaintiff also alleged that the 1974 MAI Registration Statement, covering the initial issuance of the C Stock, was fraudulent in making "an illusory promise" to have one of its domestic subsidiaries make a securities offering, in the proceeds of which the C shareholders would be entitled to participate. Plaintiff concludes that the promise was illusory because defendants have made no efforts to effect such a securities offering (Tr. 343). Aside from the questionable logic inherent in that reasoning, plaintiff's claim is totally devoid of any factual support that such promise was ever made, and he admitted that he had "no personal basis for making it [the allegation]" (Tr. 53). The reason for that void is that the language itself makes clear that no promise was made or intended. The 1974 prospectus and proxy statement merely stated that "if Management has a secondary offering of equity securities or subordinated indebtedness of a domestic subsidiary, 50% of the

[31]In addition, unless and until certain outstanding indebtedness was repaid in full — not scheduled until July 1980 — no dividends were payable out of the proceeds of any secondary offering. This indebtedness was in fact paid in full in September 1979. See p. 34 n. 25 supra.

net proceeds therefrom will be set aside for payment of a dividend on the ensuing December 15" (Exhibit D hereto at p. 11; Exhibit E hereto at p. 11) (emphasis added).[32] The 1974 prospectus (p. 12) and proxy statement (p. 12) further advised that "there should be no implication that whether through Cash Flow From Operations of [GOCC], *secondary securities proceeds* or otherwise, any amount of dividends other than a nominal amount may be paid with respect to the Series C Preferred Stock" (emphasis added).

In any event, assuming *arguendo* that defendants had promised in the 1974 offering materials to make the secondary offering (which they did not), plaintiff conceded that he did not rely on this alleged promise. Indeed, he admitted at his deposition that he did not recall reading the portion of the 1974 materials relating to such secondary offering and that the "promise," which he now perceives in the materials, therefore did not induce him to vote "yes" with respect to the 1974 offering proposal (Tr. 343-48).

[313-4A]

[32]Plaintiff conceded that this language meant that "it (a secondary offering) may or may not be done" (Tr. 338) and that this was the only provision in the 1974 prospectus which plaintiff claims constituted a promise to make efforts to obtain a secondary offering (Tr. 343).

[PAGE 475, JOINT APPENDIX, 2d CIRCUIT, BEING PORTION OF MANAGEMENT ASSISTANCE, INC. PROXY STATEMENT DATED JULY 9, 1974 AND FURTHER BEING EXHIBIT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT]

[Same district court, case name and numbering as before]

* * * flow. [Under the BCL, Management must, however, have surplus to effect the redemption or make the other payments and must not be rendered insolvent by any such payment.] Reference is made to Exhibit C for a table showing the effect of the rescheduling.

In order to reduce its sinking fund obligations on the Outstanding Preferred Stock, Management could seek to purchase from the holders thereof shares of Series B Preferred Stock at prices less than $50 per share and then apply such shares so acquired against its redemption obligation. In April 1974, Management purchased 2,000 such shares at $2 5/8 per share. As a result of limitations in the Financing Agreement and the projected cash requirements of MAI, the Board of Directors does not, at the current time, believe this method will achieve the same overall favorable effect which the proposed Amendment to the Certificate of Incorporation (if approved and filed) will effectuate. Purchases of Series A Preferred Stock are currently prohibited under the Financing Agreement and the Note Agreements (except in limited amounts to meet required sinking fund provisions) and absolutely prohibited (without consent) under the indentures relating to outstanding subordinate debentures of Management.

If approval is not given to the proposed Amendment to the Certificate of Incorporation, then, as indicated above,

Management may go into default. If Management defaults in its payment of indebtedness under the Financing Agreement and the Note Agreements (which indebtedness aggregated $17,879,619 as of June 18, 1974), the holders of the various classes of the senior and subordinated debt can accelerate all indebtedness for borrowed money of Management, which indebtedness also includes outstanding subordinated debentures (which aggregated $7,762,000 as of June 18, 1974). In such event, Management would be unable to pay such indebtedness and the Board of Directors will have to consider alternative courses of action, including the filing of a petition in bankruptcy under the Federal bankruptcy laws. It is the opinion of the Board that if a petition were filed or if creditors otherwise sought to enforce their rights, the shareholders of Management would not recover anything on their investment.

In summation, since September 30, 1968, MAI has reduced its senior secured indebtedness (including the obligation under the Financing Agreement) from $97,874,080 to $14,047,093 as of June 18, 1974. During the same period, MAI reduced its obligation with respect to the Senior Subordinated Notes from $8,400,000 to $5,009,690. Funds to effect this reduction in debt came primarily from revenues of Genesis One derived from unit record and other technologically obsolete equipment. However, for the fiscal years 1969 through 1973, MAI's aggregate loss was $57, 008,-580. In addition to the debt reduction, and despite the losses, since 1971, Management has implemented its basic/four program and expanded its domestic maintenance services so as to offset the declining rental revenues from its older equipment. As indicated in the STATEMENTS OF CONSOLIDATED OPERATIONS, MAI's revenues during fiscal years 1972

and 1973 and, as indicated on page 19, during the eight months ended May 31, 1974 increased after declining in each of the three prior fiscal years. During the eight months ended May 31, 1974, net income amounted to $1,225,753, of which $133,713 is attributed to operations and $1,092,040 is attributed to waivers of interest by lenders. In the opinion of Management's Board of Directors, MAI has reached a critical point in its efforts to maintain profitability and restore financial viability. While there is no assurance that MAI will attain these objectives, the Board of Directors of Management is of the opinion that approval and filing of the proposed Amendment to the Certificate of Incorporation, with the concurrent effectiveness of rescheduling of maturities and other changes contemplated by the Bank Amendment and the Purchase Amendment, and consummation of the Exchange Offer will alleviate the burden of major obligations and permit MAI to continue to develop its operations in a manner more likely to be beneficial to shareholders and creditors.

[475A]

[PAGES 316-319, JOINT APPENDIX, 2d CIRCUIT, BEING RESPECTIVELY, PORTIONS OF SUMMARY JUDGMENT AFFIDAVITS OF ROBERT W. BEREND, GENERAL COUNSEL, AND GERALD WALPIN, TRIAL COUNSEL, MANAGEMENT ASSISTANCE, INC., BOTH DATED DEC. 10, 1979]

[Same district court, case name and numbering as before]

* * * have disenfranchised all C shareholders who also owned common shares in at least the above ratio.

However, this would not only have been impossible to implement, but it would also have required defendants to violate State law.

As a practical matter, defendants could not possibly have determined the identities of all of the common shareholders and C shareholders, because many of these shares were held and voted in street name. Thus, it would have been impossible to determine which of the C shareholders owned the requisite number of common shares which, under plaintiff's theory, would have prevented them from voting their C Stock.

On an even more fundamental level, however, any disenfranchisement of C shareholders would have violated section 612(a) of the New York Business Corporation Law, which requires that "*Every shareholder* of record *shall be entitled* at every meeting of shareholders *to one vote for every share standing in his name* on the record of shareholders, unless otherwise provided in the Certificate of Incorporation" (emphasis added). Because the Certificate of Incorporation of MAI does not (and did not) contain any provision, relevant here, which would limit the force and effect of section 612(a), defendants would have violated State law if they had deprived any C shareholders of the right to vote on the redemption proposal.

14. Miscellaneous Other Fraud Charges
(Complaint ¶¶ 44, 45, 46, 47)

Plaintiff concluded his complaint with various miscellaneous allegations of fraud relevant to the operation of MAI which, plaintiff alleged, have damaged each C shareholder [but which he conceded were not contrary to the interests of MAI's common shareholders (Tr. 58-59)].

These miscellaneous allegations are conclusory in nature and were admittedly made without any factual support. Thus, plaintiff conceded at his deposition that he had no knowledge or information as to the basis of his accusations concerning the misconduct alleged in paragraph 47 of the complaint, and that most of the other fraud allegations in paragraphs 45-47 of the complaint were all "matter[s] of inference and deduction" (Tr. 55-57). In any event, none of these allegations has any relevance to the issue in this case — the sufficiency of MAI's proxy materials.

Moreover, contrary to plaintiff's conclusory allegations, all decisions relevant to the expenditure of GOCC funds reflect an exercise of proper business judgment. All such decisions were made with a meticulous regard for the rights of each class of MAI shareholders. For example, the allocation of parent company charges was (and is) identical for all MAI domestic subsidiaries, including GOCC, and was (and is) made in proportion to the revenue contribution of each subsidiary — a commonly used method of allocating parent company expenses among subsidiaries. (See also page 7 of the Supplementary Proxy Statement for a statement of the manner in which relevant intercompany transactions are charged.)

Perhaps the most compelling evidence that MAI fairly treated C shareholders in the computation of Cash Flow From Operations is the following: MAI, on a quarterly basis, was required to furnish to all participants in the multi-million dollar financing agreement and to all noteholders (see Proxy Statement p. 48) a detailed calculation of Cash Flow From Operations for the preceding quarter. The recipients of this computation were approximately 40 institutions (including banks) whose rights to expedited

payment of the debt to them depends on that computation. These institutions have never voiced any objection to the correctness of the computation.

There is thus no factual merit to these miscellaneous allegations made by plaintiff.

[Here omitting formal closing parts, Berend affidavit and formal opening parts, Walpin affidavit.]

I am a member of the firm of Rosenman Colin Freund Lewis & Cohen, attorneys for defendants herein. I make this affidavit in support of defendants' motion for an order, (a) pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint and granting defendants summary judgment, and (b) pursuant to the equitable powers of the Court and Rule 11, F.R.C.P., granting defendants their attorneys' fees and other litigation expenses.

The facts demonstrating that there is no merit to plaintiff's complaint are set forth in the accompanying affidavit of Robert W. Berend ("Berend Affdavit"), and will not be repeated in detail herein.

I limit my affidavit to those facts which warrant imposing on plaintiff and/or his counsel the cost of defendants' * * *

[316-9A]

[EXCERPT FROM DISTRICT CLERK'S RECORD, ITEM 52, BEING PLAINTIFFS' COMBINED SUBSTITUTE AND SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT]

[Same district court, case name and numbering as before; filed Mar. 7, 1980]

The *Parklane* case reinforces the considerations expressed by the commentators. Admittedly, much discovery remains to be done. However, plaintiffs charge that defendants have omitted to disclose the real purpose behind the redemption of the "C" shares: to expand the company's line of business without allowing the "C" shares to fully participate therein. The success with the Basic Four minicomputer has refueled the corporate treasury. It has restored the company to investment stature so that it can now raise capital for purposes of expansion. It has stirred the ambition and the imagination of corporate management. However, that management did not want to share the company's new-found prosperity. Management did not want to spend large amounts for the development of Wordstream (and probably other projects into which they desire to expand) and share the profits from such operations with the "C" shareholders. Hence, the freeze-out.

Full discovery is yet to be had, but there are already straws in the wind:

Item (1): The complaint (¶44) charges that from inception, defendants have deliberately omitted to provide "C" shareholders or the public with any but the most scant information regarding the operations of Genesis Computer or of the amounts which have accrued or may accrue upon the "C" shares. It is alleged that such conduct has depressed

the market for "C" shares. The allegation was ignored in the August 5 attempted proxy supplement and ignored again in the Berend affidavit. (See pp. 49-51 thereof). For summary judgment purposes, the allegation is admitted. It appears that plotting against the "C" shares is not of recent origin. Defendants' sense of fiduciary responsibility; their feelings of corporate accountability toward the "C" shares has always been low.

Item (2): No financial statements of Genesis One ever saw the light of day until the filing of this suit and defendants' belated ex parte effort to supplement their solicitation. A "condensed unaudited balance sheet" reflects that almost $17 million of Genesis One's total assets of $22 million was tied up in an item entitled "Due from affiliated companies."[8]

No explanation of any kind has ever been offered for this unseeming diversion of assets. Genesis One was neither a banking corporation nor an investment corporation. It was a business corporation and had need of its own assets to conduct and expand its own business for the benefit of "C" shareholders. It appears that defendants had a long standing purpose of manipulating corporate operations so as to minimize the obligation to "C" shareholders. Plaintiffs suggest that the June 27, 1978 proxy solicitation was designed to finish off the job.

Item (3): The "supplemental" solicitation also contains an "unaudited summary of operations." Under the heading "miscellaneous", we find 1975 revenue of $354 thousand and 1976 of $1.9 million. The shareholders who received

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[8]The total assets were somewhat understated because all of the leased equipment then providing revenue close to $10 million per year had been completely depreciated off the books.

this supplement were forced to speculate whether or not "miscellaneous" was, wholly or partially, compensation returned by "affiliated companies" for the use of Genesis One's $17 million. We do note that the "miscellaneous" item was down to zero for the year 1977, but the $17 million dollars was still due and owing. This matter is further pointed out as possible evidence of a long standing purpose not to deal fair and square with "C" shareholders.

Item (4): In accordance with SEC regulations requiring the insertion of such a topic, the original solicitation (pp. 4-7) contains three and one-half pages of "Reasons for Proposed Redemption." However the reasons are all verbiage and no substance. Defendants failed to articulate one good hard reason for the redemption.

Item (5): Among the said "reasons" defendants stated that the segregation of Genesis One business creates extra expense and causes operating inefficiency. Such factors were fully known at the time that the terms of the "C" shares were originally negotiated. Even further, it is stated that until senior debt is paid off, the segregation must continue.

Item (6): Under the said "reasons", defendants stated that for violation of the Exchange's "one share-one vote" rule, the common shares could not be listed on the New York Stock Exchange as long as the "C" shares remained outstanding. A less drastic remedy than redemption would have been to allow full voting rights to the "C" shares (which the common shares would still have out-voted, nine to one). Even further, any intent to list the company's shares was expressly denied. [8a]

[8a] On November 1, 1979, MAI common shares began trading on the New York Stock Exchange.

Item (7): One of the said reasons states that redemption "may also facilitate the company's ability to obtain financing," but no intent to seek financing was indicated. Especially bearing in mind that certain financing proceeds had to be shared 50-50 with the "C" shareholders, we must assume that defendants had no intent to seek significant financing; else they are guilty of material non-disclosure.

Item (8): The original proxy statement mentions that in order to manufacture Wordstream products, another subsidiary of MAI was "currently negotiating" for "substantial additional plant facilities." Thereafter, plaintiffs charged in their complaint that defendants had spent at least $5 million entering into the Wordstream business and that defendants had "fixed plans and commitments to spend at least an additional $10 million" (¶ 35).

In the face of this rather specific allegation, defendants went no further in their attempted supplement of August 5 than to say:

> "The Company and its other subsidiaries, * * * expended substantial sums for developing new business * * *, but such expenditures do not affect * * * [Genesis One's] 'Cash Flow From Operations' * * *, and thus do not reduce the amount of dividends paid on the Series C Preferred Stock."

The $5 million and $10 million allegations were avoided rather than answered in the "supplement." Neither do we find anything in their summary judgment affidavits or exhibits to refute the $5 million dollar and $10 million dollar allegations, and for summary judgment purposes, they are admitted.

The fact that Genesis One did not spend the money is immaterial. The "C" shareholders were entitled to know in terms of dollars the size of the expenditures and commitments which MAI and all of its subsidiaries had committed to make in the development of the Wordstream products so that plaintiff "C" shareholders would be in a position to evaluate possible future cash flow income from this source. The deliberate hiding of this vital information is submitted as indicative of a hidden purpose for the redemption.

Item (9): The terms and conditions of the "C" shares were most generous from the standpoint that defendants had no obligation to pay interest, carrying charges or dividends (using the term in its ordinary sense) upon the "C" shares. All that they had to do was return the original $50.00 investment by September 30, 1984. Further, any unearned portion up to $40.00 would be cancelled.

The original solicitation (p. 9) reveals that the entire cost of redeeming the "C" shares was financed by a bank loan, the terms of which were far less generous.[9] Any notion that MAI in proposing this redemption was seeking an outlet for its surplus cash is thus dispelled.

On June 27, 1978, MAI was a very profitable company, but it was also a company that had run up an operating loss during six or seven of its previous ten years. During such period it had also gone through two re-organizations and each of those times, the bankers had to make substantial

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[9]We calculate that MAI contracted to pay a maximum of $3,658,403 to borrow money to pay off this non-interest bearing obligation. Also, as part of the price of their consent, MAI's bankers increased the interest rate on senior debt by 1% charged a commitment fee, demanded compensating balances and put restrictions on future indebtedness.

concessions, including the waiver of interest, in order to keep the company alive. Knowing the habits of bankers and the length of their memories, we daresay that on June 27, 1978, MAI was not possessed of unlimited lines of credit.

What was the real purpose that sent MAI to the bank, to burden its limited line of credit for the sum of $9 million in replacement for a non-interest bearing obligation due several years hence? The "Reasons for Proposed Redemption" as stated in the solicitation do not suggest any valid business purpose for contracting such heavy obligations, which in turn suggests that the true purpose was hidden.

Item (10): We also note that defendants were in somewhat of a hurry to freeze-out the plaintiff class. They called a special meeting of shareholders to occur on August 10, 1978, within six months of the scheduled date for a regular meeting of shareholders. Additional legal, accounting and solicitation expense was incurred. Why? Because, every day that the redemption was delayed exposed them to the risk that the true purpose of the redemption would become known. As soon as the magnitude of the company's plans to market Wordstream became generally known in the marketplace, as soon as cash flow earnings began to rise, the market price of "C" shares would also commence to rise and the true purpose of the redemption would be frustrated. The reason for calling a special meeting of shareholders was to make sure that the *coup de grace* was administered before the true purpose came into view.

Item (11): Many firms purchase their own stock in the open market from time to time and the practice, in moderation at least, has never been criticized. Also, there have been many instances of companies which felt that

their own stock was the best investment of which they were aware for their surplus funds. In such instances, companies have invited voluntary tenders of stock for cash. Again, so long as such tender offer does not threaten to deprive an active market for stock still outstanding, there has been little criticism of the practice.

Obviously, defendants could have followed either route with respect to the "C" shares with their surplus funds (none of which were available). They could have made open market purchases, and judging from prices then prevailing (which they had caused or contributed to depress), they could have obtained a substantial number of shares at or below $10.50. If defendants had made a voluntary tender offer on June 27, 1978, indications are that a substantial portion of the "C" shares would have been tendered.

The non-coercive routes were open and available. In line with present day notions of corporate fiduciary responsibility, defendants should have, at least, studied, if not attempted to take up the "C" shares on a voluntary basis. Defendants did not do so. Instead, they took the freeze-out route.

Why the freeze-out route? Plaintiffs again submit that a voluntary redemption would not have freed defendant from the two restrictions here mentioned. It is again submitted that the real reason of the freeze-out was to free the company from provisions freely negotiated which saved the company from collapse and which defendants (prosperity having bloomed again) came to consider as burdensome.

SUMMARY: The purposes as stated were a mere screen for the true purpose of this redemption. Plaintiffs say that the real purpose of this "no-purpose" redemption was to free the company from the 50-50 restriction and to avoid the necessity of sharing the profits from new ventures with the "C" shareholders. Until defendants show otherwise, they have not met the burden of demonstrating that there is no genuine issue as to any material fact and they may have no summary judgment.

[R. 52/13-20]